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CASES

DETERMINED BY THE

PROBATE DIVORCE AND ADMIRALTY DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL FROM THAT DIVISION

AND BY THE

ECCLESIASTICAL COURTS.

1903—1904.

[IN THE ARCHES COURT OF CANTERBURY.] 1903
[APPEAL FROM THE CONSISTORY COURT OF LONDON.] *Aug.* 5.

THE LONDON COUNTY COUNCIL *v.* DUNDAS AND OTHERS.

Ecclesiastical Law—Jurisdiction—Irrevocability of Faculty except for Fraud —Disused Burial Grounds Act, 1884 (47 & 48 *Vict. c.* 72), *s.* 3—*Faculty authorizing Erection of Building in Contravention of Act of Parliament —Meaning of Exemption permitting Building to be erected "for the Purpose of enlarging a Church, Chapel, Meeting-house or other Places of Worship"—Variation of Faculty by Consent of Petitioners—Practice—Costs.*

A faculty granted by the Ordinary after citation and unappealed against cannot, in the absence of the consent of all the parties interested, be revoked for any cause other than fraud.

The 3rd section of the Disused Burial Grounds Act, 1884, provides that after the passing of that Act it shall not be lawful to erect any buildings upon any disused burial ground (defined by that Act to mean a burial ground in respect of which an Order in Council has been made for the discontinuance of burials therein in pursuance of the Burial Acts, 1852 and

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1853), except for the purpose of enlarging a church, chapel, meeting-house or other places of worship.

In June, 1901, on the application of the vicar and churchwardens of a parish church in the diocese of London within the metropolis, the Ordinary sanctioned by faculty the erection on a portion of the churchyard of the parish—a disused burial ground within the above Act of 1884—in substitution for the erection on the same churchyard of a parish room over two vestries at the south end of the church sanctioned by a previous faculty (granted in September, 1900), a larger hall capable of seating 240 persons, abutting on the church on its north side immediately behind the chancel and communicating with the church by means of a door or doors, together with two vestries on the east side of the church, and lavatories and a kitchen on the sides of the hall, the hall to be used when required as a vestry and for Sunday schools and mission services and other parochial purposes.

Citations to lead these faculties had been duly served, but no appearance had been entered thereto, and the decrees in pursuance of which they had been granted were not appealed against. In March, 1902, the London County Council, the statutory authority to enforce the Disused Burial Grounds Act within the metropolis, instituted a suit in the Consistory Court of London, and in their petition prayed that the faculty of June 27, 1901, should be revoked or amended in such manner that no authority should be given therein to contravene the above 3rd section of the Act of 1884. The vicar and churchwardens appeared to defend the suit, and pleaded that the Court had no jurisdiction to rescind the faculty; but the sole question relied on and argued at the hearing was whether the faculty sought to be revoked contravened the Act of 1884. The petitioners did not ask for the revocation of the faculty on the ground of fraud, and gave no evidence either of fraud or of the Court having been deceived by the respondents or third parties. The Consistory Court of London refused to revoke the faculty as prayed, holding that the faculty had been properly granted, as the buildings the erection of which had been sanctioned by it were buildings erected for the purpose of enlarging the church within the exception contained in the 3rd section of the above Act.

The London County Council appealed:—

Held, on appeal, that the refusal of the Court below to revoke the faculty was right, as where in a faculty suit a citation has been duly served no Ecclesiastical Court has jurisdiction in the absence of consent to revoke a faculty obtained in the suit without fraud and unappealed against.

Semble, that the faculty sought to be revoked authorized an infringement of the Disused Burial Grounds Act, 1884, in so far as it sanctioned the erection of the parish hall and the lavatories and kitchen connected with it, and was to that extent a nullity; that the 3rd section of that Act did not extend to render lawful the erecting of buildings which, though under the same roof as the church and in physical communication with it, were intended to be used for ecclesiastical purposes for which the church would

not be used in ordinary course, and that so far as the 3rd section of the Act related to churches it only permitted buildings to be erected which were in physical communication with the church and enlarged it for the main and primary purpose of religious worship.

The appeal was dismissed without costs, as the point on which the respondents succeeded as to the irrevocability of the faculty, though raised on the pleadings, had not been relied on or argued in the Court below.

THIS was a civil cause instituted in the Consistory Court of London on behalf of the London County Council, who, as the statutory authority to enforce the Disused Burial Grounds Act, 1884, within the metropolis, applied to that Court by petition for the revocation or amendment of a supplemental faculty issued under the seal of the Chancellor of London on June 27, 1901, and granted to the Rev. Neville Dundas, the vicar of the parish church of the Holy Trinity, Stepney, in the diocese of London, and Alfred O. Goodrich and George Grant, the churchwardens of that parish, to build on a portion of the churchyard of the parish—a disused burial ground within the above Act—a vestry and a parochial hall abutting on the end of the chancel of the parish church, to be used when required as a vestry and for Sunday schools and mission services and other parochial purposes, in lieu of the hall sanctioned to be erected over two vestries at the south end of the church by a faculty granted to the same persons and dated September 12, 1900.

The petition, dated March 8, 1902, after reciting the 3rd section of the Disused Burial Grounds Act, 1884 (1), alleged (inter alia) that the petitioners were, by virtue of the provisions of the Metropolitan Board of Works (Various Powers)

(1) 47 & 48 Vict. c. 72, s. 3. This section is as follows: "After the passing of this Act it shall not be lawful to erect any buildings upon any disused burial ground, except for the purpose of enlarging a church, chapel, meeting-house, or other places of worship." The 2nd section of the same Act provides that—"In this Act a disused burial ground shall mean a burial ground in respect of which an Order in Council has been made for the discontinuance of burials therein in pursuance of the provisions of the said recited Acts" (15 & 16 Vict. c. 85, and 16 & 17 Vict. c. 134). [This definition of "disused burial ground" given by the Disused Burial Grounds Act, 1884, is extended by the Open Spaces Act, 1887 (50 & 51 Vict. c. 32), s. 4.]

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Act, 1885 (48 & 49 Vict. c. clxvii.), and the Local Government Act, 1888 (51 & 52 Vict. c. 41), the authority for preventing the violation and for enforcing the due observance of the Disused Burial Grounds Act, 1884, within the metropolis, and were empowered to institute and prosecute all such legal proceedings and do all such matters, acts, and things as might, in the opinion of the Council, be necessary or expedient for preventing the violation by any person, and for enforcing the due observance by all persons of the said Act of 1884 within the metropolis; that by Orders in Council of November 4, 1857, and January 7, 1864, burials had been ordered to be discontinued in the catacombs and vaults beneath the said Holy Trinity Church and (with the exception of then existing family graves) in the churchyard of the said Holy Trinity Church; and that the petitioners submitted that the churchyard of that church, being a disused burial ground within the meaning of the said Act of 1884 and the Acts amending the same, the buildings (or certain of them) authorized to be erected by virtue of the above-mentioned supplemental faculty of June 27, 1901, if erected, would contravene the provisions of s. 3 of the said Act of 1884 above set out, and particularly that the parochial hall authorized by the said supplemental faculty was not such a building as would come within the exceptions contained in the said section. The petition then concluded with a prayer that the Court would be pleased to decree that the said supplemental faculty of June 27, 1901, be revoked or amended in such manner that no authority should be given therein for the erection of any buildings which might contravene the provisions of s. 3 of the Disused Burial Grounds Act, 1884.

On this petition being presented the Court directed that notice thereof should be given to the vicar and churchwardens, and they having appeared as respondents in the suit, an answer was brought in on their behalf dated April 29, 1902. This answer, after alleging that the petition disclosed no grounds in point of law for relief; that the petitioners were not ignorant of the respondents' intention to apply for the faculties of June 27, 1901, or September 12, 1900, or taken

by surprise by the orders in pursuance of which those faculties were granted, and were guilty of laches, and had laid by until the time for appealing from those orders had elapsed, and that citations to lead to the faculties in question had been duly issued and served, pleaded in the 8th, 9th, and 10th paragraphs thereof as follows:—

"8. The prayer of the said petition is contrary to the rules and practice of this honourable Court, and illegal in that it prays the Court to rescind its own order after it has been acted upon.

"9. The matter of the said application for the said faculty of September 12, 1900, is res judicata, and the respondents submit that this honourable Court has no jurisdiction to rescind its order upon the grounds alleged in the petition, or at all.

"10. The respondents submit that the London County Council are estopped by their conduct in having permitted the said order to be acted upon without protest to this Court from now raising the objections alleged in their petition."

The answer further alleged in the alternative that the faculties of June 27, 1901, and September 12, 1900, were within the exception contained in s. 3 of the Disused Burial Grounds Act, 1884, that nothing in that Act precluded the user of an enlargement of a church for the general work of parochial missions, and that the acts and things licensed by the said faculties were all part and parcel of one enlargement of the church of Holy Trinity, and did not constitute a building for secular or non-ecclesiastical purposes the erection whereof the Legislature intended to prevent by s. 3 of the Disused Burial Grounds Act, 1884.

To this answer the petitioners replied, alleging (inter alia) that the respondents by their petition for the faculty of June 27, 1901, misled the Court, inducing it to grant the faculty by failing to bring before it the true facts of the case, and that the Court had jurisdiction to cancel, revoke, and withdraw any faculty which it would not have granted if the knowledge and intentions of the applicants had been fully and fairly disclosed to the Court.

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1902. May 1. The cause came on to be heard before the Chancellor of the Diocese of London (Dr. Tristram, K.C.). The hearing was continued on May 16, May 30, and June 13 last. Witnesses were examined orally for the petitioners and for the respondents. The result of their evidence appears from the judgment of the Consistory Court of London. It appeared by recitals in the faculties of September 12, 1900, and June 27, 1901, that a citation citing all persons having or pretending to have any interest in the premises to shew cause why a licence or faculty for the purposes set out in the petition for each faculty should not be granted, had been duly served in each case by fixing the same upon the principal door of the church of the Holy Trinity, Stepney.

Daldy, for the petitioners, the London County Council. The Ecclesiastical Courts have, since the Disused Burial Grounds Act, 1884, no longer the full power they previously possessed of granting faculties for buildings on closed churchyards: *In re Bettison* (1), and s. 4 of that Act; and the faculty of June 27, 1901, for the erection of the parish hall and the buildings connected with it clearly contravenes s. 3 of that Act, the hall and buildings in question being buildings to be used for other purposes than religious worship, and, therefore, even if structurally communicating with the church, not an enlargement of it within the section: 58 Geo. 3, c. 45, s. 60; *Hoare* v. *Osborne* (2); Ayliffe's Parergon, 169. The London County Council entirely repudiate making any charge against the respondents of the faculty having been obtained by fraud or deceit, but they submit that the respondents in fact misled the Court when the faculty was granted, and did not fully disclose matters both with respect to the hall being separate from the church and to the many parochial purposes, including, according to the information of the petitioners, even secular purposes, for which it is intended to be used. The Court has, therefore, power to revoke the faculty as prayed in the petition, and ought to do so.

[DR. TRISTRAM. The faculty of June 27, 1901, was decreed

(1) (1874) L. R. 4 A. & E. 294. (2) (1866) L. R. 1 Eq. 585.

in chambers without any evidence, and merely on the statement that it was practically and substantially a substitution for the faculty of September 12, 1900, with a variation as to the site of the hall. Therefore, the faculty not having been decreed in Court, I should be of opinion that if any person was taken by surprise, and there was reasonable ground for revoking it, I should have power to allow any person alleging a grievance to state it and have it inquired into. The answer of the respondents appears to contain allegations on the assumption that the faculty in question was decreed in Court. That this faculty is in a different position need not be argued.]

Arnold Statham, for the respondents, the vicar and churchwardens of Holy Trinity Church, Stepney. Having regard to the intimation given by the Court, the respondents, whilst not waiving the questions arising on the allegations in paragraphs 8–10 of their answer, do not now press them, and the arguments addressed to the Court on their behalf will be confined to the merits of the application made by the petitioners. First, the respondents admit that by virtue of their statutory powers the London County Council have a locus standi to bring the present suit, though their intervention at so late a period is a matter to be strongly commented on. Secondly, as to the objections taken to the erection of the parochial hall. The exception contained in the 3rd section of the Act of 1884 was recently discussed in *The Vicar of St. James the Less, Bethnal Green* v. *The Parishioners of the Same* (1), and it was then decided that under that exception schools and a parish hall used for mission services for adults and children independent of the church as to construction might be enlarged without infringement of the Act. If this enlargement was within the exception, much more is the enlargement of the church itself in the present case. Religious services will be held in the building, and whilst it is not intended that it should be used for secular purposes, it is submitted that, being once shewn to be an enlargement for religious worship, it would be quite immaterial to inquire for what other purposes it might be used. The ecclesiastical law

(1) [1899] P. 55.

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before 1884 allowed the erection of buildings for ecclesiastical purposes on closed churchyards notwithstanding that they might be incidentally used even for secular purposes: *Campbell* v. *The Parishioners of Paddington* (1), cited in *In re Plumstead Burial Ground* (2), and the passing of the Act of 1884 has not interfered with the existing law on the point; the object of the Act being, not the prohibition of buildings sanctioned as enlargements of churches by the ecclesiastical authorities, but the building of dwelling-houses on disused burial grounds.

Daldy replied.

Cur. adv. vult.

1902. July 31. DR. TRISTRAM. On August 2, 1900, an application was made to this Court on behalf of the vicar, the Rev. Neville Dundas, and the churchwardens of the parish of Holy Trinity, Stepney, to decree a faculty authorizing them to enlarge the chancel of the parish church which is at the north end thereof, to form a side chapel, and to erect a clergy and choir vestry on either side of the south end of the church, with a parish room over them extending across the south end of the church. As it appeared in evidence that the application for the faculty was supported by the unanimous vote of the parish vestry and by the parishioners, and that the granting of it would be for the spiritual welfare and convenience of the parish, after inspecting the church and ascertaining that the proposed room over the vestries would accommodate over 200 persons, and would be used for vestry meetings of the parishioners, for missions and other religious services, for meetings for religious and charitable purposes, and for Sunday schools then held in the church, I ordered the faculty to issue on September 12, 1900; but on the plan for alterations being submitted to Lord Tredegar, who is the principal ground landlord in the parish, and whose father had been the donor of the site of the parish and churchyard, his lordship objected to the front entrance to the church being altered (as would have been the case if the proposed works were carried out) on the ground that the alteration would have been out of

(1) (1852) 2 Rob. E. 558. (2) [1895] P. 225, at p. 237.

keeping with the original design of the building, and suggested that the clergy and choir vestries and vestry hall should be erected at the north instead of at the south end of the church. To give effect to his lordship's wishes a petition for a supplemental faculty was filed in this Court in June, 1901, with the sanction of the vestry, to authorize the building according to a plan filed of clergy and choir vestries on the south-west side of the church, and of a parochial hall abutting on the end of the chancel, to be used when required as a vestry, and for Sunday schools and mission services and other parochial purposes, in lieu of the hall authorized to be erected by the faculty dated September 12, 1900. A citation was published on the church door giving notice of the application. No appearance having been entered to the citation, a faculty on June 27, 1901, was issued by my order in accordance with the provisions of the Order in Council of June 28, 1895, in the case of unopposed faculties, and shortly afterwards the building of the vestry hall was commenced. On November 16, 1901, the solicitor for the building committee received a letter from the solicitor to the London County Council stating that the building did not appear to be one that was allowed to be erected on a closed churchyard by the Disused Burial Grounds Act, 1884. Further correspondence on the subject passed between the solicitor for the building committee and the clerk of the London County Council from November, 1901, to March, 1902, and on March 15, 1902, the solicitor to the London County Council wrote to Mr. Dundas to inform him that the council was taking steps to obtain a revocation of the supplemental faculty, they having on March 10, 1902, filed a petition in which they alleged: [DR. TRISTRAM read from the petition the allegations therein and the prayer of the petitioners as above set out, and continued:—]

On April 18, 1902, on the application of the London County Council, I made an order in chambers for a further hearing of the case, being satisfied that it was owing to the accident of the London County Council not being aware of the publication of the citation prior to the issue of the faculty that they had been prevented from taking the opinion of the Court on the

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questions raised by their petition. Mr. Daldy, in opening the case as counsel for the London County Council, stated that he did not ask the Court to revoke or amend the faculty on the ground that it had been improperly obtained by the vicar and churchwardens, but on the ground that had all the facts been brought to the notice of the Court by a public inquiry the faculty would not have been granted. On application for faculties to authorize alterations in churches and churchyards in such a case as the present two questions arise for the consideration of the Court—(1.) whether the Court would be exercising a wise or judicial discretion under the circumstances of the case by sanctioning the alterations asked for; and (2.) whether the Court would be precluded from sanctioning them by statute or by previous decisions of the Ecclesiastical Courts.

Upon the first question, whether under the circumstances of the case the Court was justified in the exercise of its discretion in issuing the faculty, the following facts, as proved in evidence, have a material bearing. The population of the parish is between 16,000 and 17,000. The area is three or four times larger than any other metropolitan parish. The church is placed in a churchyard of moderate dimensions. The south and principal entrance to the church faces Tredegar Square, which is a long and airy square with a garden in the centre, and the Coburn Charity School with a large playground abuts on the west side, and Litchfield Road on the north or chancel side of the churchyard. Victoria Park is only a few minutes' walk from the church, and according to the evidence of Archdeacon Sinclair and others the district cannot be described as a congested one. Some years ago the London County Council, under an agreement with the vicar and churchwardens, undertook to lay out the churchyard as a garden and to keep it in order for seven years. This they did, having placed in it seats for fifty persons, and in the summer and autumn months it was frequented sometimes by forty or fifty people or more. But on the expiration of the agreement the county council ceased to take care of it, and it appeared that the caretaker had at times experienced great difficulty in keeping order in it or at the approach to the

church, and by the evidence of the churchwardens the churchyard at night, without imputing blame to the caretaker, had been the scene of immoralities and other scandalous misconduct.

For carrying on the church work of this large parish the only places under the control of the vicar are the church, with accommodation for 800 persons, the clergy vestry, with accommodation for twelve persons, and two mission halls near the church, each with accommodation for about 200 persons. In his evidence Mr. Dundas stated that his governing desire in applying for this faculty was to obtain such further accommodation as was essential for carrying on the spiritual work of the parish, the present accommodation being quite inadequate for that purpose. Further accommodation was required for the holding of vestry meetings which are held in the church, of mission services with church prayers and addresses, of Bible classes, of confirmation classes, of congregational meetings, of meetings in support of home and foreign missions, of Sunday schools, of Sunday-school teachers' classes, of children's services, of special services for men, and of other meetings connected with the parish work, and for these purposes the addition of the vestry, with accommodation for over 200 persons, was necessary. He further stated that there were four Sunday schools in the parish, the largest one being held in the afternoon, in the church, which was followed by the children's service and afterwards by the Sunday evening service, and that it was necessary preparatory to the subsequent services, at great trouble and inconvenience, to clear out the church after the Sunday school, and again after the children's service was over. He also stated that he held in the church special services for women, and that with the aid of the vestry hall he would be able to hold special services for men which he otherwise could not do. To this it was objected by Mr. Daldy and the two parishioners he called as witnesses in support of his case that, the churchyard having been constituted an open space by statute and laid out with seats in it and made use of and appreciated by the parishioners, it was unfair now to deprive them of the full use of it by the erection of

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a building on a considerable part of it, taking from it its principal feature, as well as depriving the parishioners of the free circulation of air intercepted by the buildings.

[DR. TRISTRAM read the material portions of the evidence of these two witnesses on these points, and the evidence given by the two churchwardens, by Archdeacon Sinclair, and by another witness called on behalf of the respondents, such evidence being mainly as to the great benefit the buildings objected to would be to the parish and neighbourhood, the popularity of the movement for the hall, the desirability of its being erected to provide for the pressing wants of the parish, and as to the portions of the churchyard not built on being ample for use as a place of recreation. The judgment then proceeded as follows:—]

It appearing that the churchwardens and parishioners generally approved of this vestry hall as necessary for carrying on the church work of the parish, with the exception of the witnesses produced by the London County Council, and having myself inspected the church, the churchyard, and the building objected to, I have come to the conclusion that, provided I have jurisdiction to grant a faculty for a vestry hall, there are ample grounds for my—in the exercise of my discretion—doing so in the present case.

The next question for the consideration of the Court is whether the erection of the vestry hall abutting on the church with two doors leading out of the vestry into the church, to be used only for ecclesiastical and charitable purposes, is to be held as in contravention of the 3rd section of the Disused Burial Grounds Act, 1884, as not being a building "for the purpose of enlarging a church." According to Phillimore's Ecclesiastical Law, vol. ii. p. 1493, and other writers on ecclesiastical law, "a vestry properly speaking is the assembly of the whole parish met together in some convenient place for the despatch of the affairs and business of the parish; and this meeting being commonly held in the vestry adjoining to, or belonging to the church, it hence took the name of vestry, as the place itself does from the priests' vestments, which are usually deposited and kept there." In every church there

is a vestry, and in the large parishes of London, such as St. George's, Hanover Square, St. George's-in-the-East, and other churches mentioned by Archdeacon Sinclair, there are vestry halls in addition to the vestry for the clergy, and where a vestry is erected on consecrated ground it is under the jurisdiction of the Ecclesiastical Courts ratione loci: *Wilson* v. *McMath* (1); or if it abuts on the church with a door into the church it has been held to be part of the church. Thus in *Wing* v. *Taylor, falsely calling herself Wing* (2), which was a suit for nullity of marriage heard in the full Court for Divorce and Matrimonial Causes in 1861 before Sir Cresswell Cresswell, as Judge Ordinary, and Wightman and Williams JJ., it was held that a marriage solemnized in the vestry belonging to and abutting on the church was a good marriage. The validity of the marriage in that case was contested on three grounds—one being that the whole of the ceremony of the marriage was performed and solemnized in the vestry room belonging to and abutting on the parish church; the second ground being that the parties to the marriage, the clergyman and the witnesses to it, were all present in the said vestry room during the whole of the time of the said marriage; and the third ground being that the marriage was solemnized contrary to the rubrics and statutes, and was therefore void. To this averment there was a demurrer. I was counsel for the petitioners, and when I came to my argument on the demurrer I argued that the marriage was solemnized in contravention of the rubric which was incorporated with the Act of Uniformity, as that rubric required the parties to come into the body of the church, and the service to proceed whilst they were there standing together, and that by the Marriage Act all marriages were to be solemnized in the church or chapel in which banns could be lawfully published; but upon my admitting that there was a door opening from the vestry into the church, I was stopped by the Court saying, "We are clearly of opinion to allow the demurrer as to the third and fourth paragraphs of the petition. We think the marriage was valid though celebrated in the vestry. . . ." As this was a decision of the full Court

(1) (1819) 3 Phillim. 67, at p. 82. (2) (1861) 2 Sw. & Tr. 278.

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from which an appeal lay direct to the House of Lords, it is a binding authority until reversed by the House of Lords.

Since the hearing of this case I have inspected the immediate neighbourhood of the church, and, as I have already stated, the church, the churchyard, and the building objected to. On the west side of the north end of the church there is a clergy vestry containing room for about twelve persons. Out of the vestry there is a passage, in which the robes of the choir are hung, leading to a room at the north end of the church—forming the north end of the church. At present the end of the hall is from three to four feet in some parts and two and a half feet in other parts distant from the present north end of the church. It is proposed, as soon as the hall is completed, to throw the vestry, the passage, and the room at the end of the church into the new chancel, and to extend the new chancel on the vacant place between the hall and the north end of the church up to the wall of the church so as to meet the outer wall of the hall, which will be utilized as the inner wall of the chancel, with two doors leading from the chancel into the hall, thus bringing this case within the ruling in *Wing* v. *Taylor*. (1) I am of opinion that the Court has jurisdiction to issue a faculty for the erection of the vestry hall.

The next question for the consideration of the Court is whether the terms of this faculty of June 27, 1901, should be amended so as to preclude the hall from being used for secular purposes by limiting its use to that of ecclesiastical or charitable purposes. On this question Mr. Statham, in support of the hall being permitted to be used for secular as well as for ecclesiastical and charitable purposes, relied on the judgment of Dr. Lushington in the case of *Campbell and Others* v. *The Parishioners of Paddington*. (2) That was an application to Dr. Lushington, sitting in this Court, to grant a faculty authorizing a new and suitable building, or new and suitable buildings, for the holding of vestry or other parochial meetings on a piece of ground belonging to the parish of Paddington which had been consecrated for, but never used for, burials. Dr. Lushington in his judgment said that when ground is

(1) 2 Sw. & Tr. 278. (2) 2 Rob. E. 558.

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once consecrated no judge has power to grant a faculty to sanction the use of such ground for secular purposes. Referring to an old case, the case of *The Rector of St. George, Hanover Square* v. *Steuart* (1), in which it was held that a faculty could not be granted to erect a charity school on part of a churchyard, Dr. Lushington added: "Though the present application is not precisely the same, still it is one involving some difficulty. I have, however, considered the question; it seems to me that there is some difference between sanctioning the erection of a charity school and a vestry. A charity school is purely secular; but a vestry room is of rather a different character,—a vestry room is employed for ecclesiastical as well as secular uses. The Court taking this view of the matter will not refuse its sanction to the application. The faculty may be issued; but those taking it must remember that they take it liable to all objections and proceedings which may be raised and had in another Court": *Campbell and Others* v. *The Parishioners of Paddington.* (2) The faculty of June 27, 1901, in this case was issued in chambers on the precedent approved of by Dr. Lushington in this case of St. George's, Hanover Square. Before ordering it to be issued I considered whether or not it should be so worded as to preclude the room being used for secular purposes. But it is not usual for the judge in chambers to depart from a precedent established by one of his predecessors, especially by so distinguished a judge as Dr. Lushington, without having the question argued and considered in Court; and, after hearing the able arguments of Mr. Daldy and Mr. Statham on this question, I have come to the conclusion that the faculty should be so worded as to preclude the room from being used for secular purposes. I am prepared to authorize it to be used as a vestry room and for ecclesiastical and charitable purposes, following the provisions contained in 13 & 14 Vict. c. 57. That Act, after reciting that the holding of vestry or other parochial meetings in the parish church or chapel, or in the vestry room attached to such church or chapel, is productive of scandal to religion and other great inconveniences for

(1) (1740) 2 Str. 1126. (2) 2 Rob. E. 558, at p. 560.

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remedy thereof authorized the Commissioners for administering the Laws for the relief of the Poor in England in any parish in which the population exceeds 2000 persons, upon application in writing of the churchwardens made in pursuance of a resolution of the vestry, to make an order to be published in the *London Gazette* that the Act or any part thereof shall be put in force in the parish; and by s. 2 of the Act it was provided that: "From and after the expiration of twelve calendar months from the making and publishing of any such order no meeting of the inhabitants of the parish for the purpose of holding a vestry, or for any other purpose than that of divine worship, or some ecclesiastical or charitable object, or some other purpose approved by the bishop of the diocese, shall be holden in any parish church or chapel, ... nor in the chancel thereof, nor, except in case of urgency and with the previous approval of the said Commissioners, in the vestry room attached to such church or chapel in any parish or place named in such order, any public or private Act of Parliament to the contrary notwithstanding."

I shall also insert a provision in the faculty to enable persons interested in these matters, in case they consider that the hall is being used for secular purposes, to apply to the Court on motion for an order to prevent its being so used.

I have had a communication from the London County Council asking that they should have notice of any application made to the Court before it is heard for a faculty to enlarge a building on a closed churchyard, and I propose to make an order under 10 Geo. 4, c. 53 (1) that such notice shall be given to the London County Council by the registry on every such application.

I should also like to mention that since 1884 it has been the constant practice of this and other Ecclesiastical Courts to grant faculties for the enlargement and erection of vestries on closed churchyards. The present vestry in this church only holds

(1) Entitled "An Act to regulate the duties, salaries, and emoluments of the officers, clerks, and ministers of certain Ecclesiastical Courts," and s. 9 of which gives power to the judge of the Consistory Court of London to make rules for regulating the proceedings in that Court.

twelve persons, and is therefore wholly insufficient for vestry meetings in a parish with a population of 16,000, and it is only reasonable that the Court should have power to grant a faculty authorizing the erection of the proposed hall as an enlargement to the church. In the present case part of the application was for leave to erect a new clergy vestry and a new choir vestry. No objection was taken to this part of the application, and if the Court has power to grant a faculty for these purposes it has now power to grant a faculty for the erection of the parish vestry. In London, and especially in the City, where the clergy are non-resident, it is of vital importance that the clergy should have vestries of sufficient size to enable them to see their parishioners there, and for holding confirmation and other classes. As long as church rates could be enforced, where a vestry was insufficient for meetings of the parishioners, the churchwardens could always provide out of the rates a room to which the meetings might be adjourned; but the clergy and churchwardens having now no funds for that purpose, it is the more important that they should be provided with a vestry adequate for the ecclesiastical requirements of the parish.

With regard to the costs of this case, I have considered that question very carefully, and I shall leave each party to pay their own costs. For the Court fees the solicitor for the London County Council, as having invoked the aid of the Court, is responsible, but, having paid them into the registry, he may apply in chambers for an order on the respondents to recoup him for the whole or part of them.

In accordance with this judgment the following decree was drawn up and entered in the Consistory Court Registry: "The judge having heretofore heard the evidence of witnesses and counsel for the petitioners and respondents, and having personally inspected the church and churchyard, ordered that the faculty issued to the vicar and churchwardens of the parish of the Holy Trinity, Stepney, on the 27th day of June, 1901, be amended by authorizing and directing the said vicar and churchwardens to erect a clergy vestry, and underneath it a choir vestry, with an area at the north-east end of the

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church according to the plan filed in the registry, and by directing that the building erected abutting on the end of the chancel of the said church be used as a vestry hall for meetings of the parishioners of the parish of the Holy Trinity, Stepney, in relation to the ecclesiastical affairs of the church and parish, and for no other meetings for parochial purposes. That it may be used for mission services, for the celebration of morning and evening prayer according to the rites of the Church, under the sanction of the bishop of the diocese, for special services for men and for special services for children, for meetings for home and foreign missions and for charitable purposes, and Sunday schools and other ecclesiastical purposes, but not for any secular purposes, with a proviso that persons interested in the matter be at liberty, in case they shall consider that the building is being used for secular purposes, to apply to the Court for an order to prevent it from being so used. And the judge ordered that the vicar and churchwardens bring into the registry when required the said faculty for the purpose of amendment. And the judge ordered that each party pay their own costs of the application; the Court fees of the petitioners to be paid in the first instance by the petitioners' solicitors."

Against this decree the London County Council appealed to the Arches Court of Canterbury.

1903. May 25; July 22, 23. On these days the appeal was heard before the Dean of the Arches (Sir Lewis Dibdin, D.C.L.). (1)

[During the opening of the appeal by counsel for the appellants on the first of these days, the DEAN OF THE ARCHES intimated that if it was intended to proceed with the appeal the question ought to be argued whether any faculty decreed after citation and unappealed against could in the absence of fraud be revoked or amended without the consent of the parties.]

(1) The Court sat in the Church House at Westminster.

Danckwerts, *K.C.*, and *Daldy*, for the appellants, the London County Council. A faculty is merely a licence dispensing with ecclesiastical censures—*Reg.* v. *Twiss* (1); Rogers' Ecclesiastical Law, p. 513—and like other licences is revocable by whatever authority has granted it. Thus, where a faculty has been obtained for the introduction into the church and the retention there of anything which turns out to be inconvenient or no longer required, another faculty may be granted for its removal: *The Churchwardens of St. John's, Margate* v. *The Parishioners of the Same* (2); *Jay* v. *Webber* (3); and in *Butt* v. *Jones* (4) there are observations by Sir John Nicholl that faculties are revocable, not only for fraud, but for any other good cause, the dictum in *Fuller* v. *Lane* (5), that a faculty is good even against the Ordinary, not applying to cases where a cause for revocation existed; so a faculty may be revoked, according to Rogers' Ecclesiastical Law, p. 520, "where the discretion of the Ordinary has been imposed upon or the faculty itself vicious." Moreover, the fact that the Court was misled here as to the character of the hall and the purposes for which it might be used is sufficient to entitle the petitioners to have it revoked.

[They also referred to *In re St. Gabriel, Fenchurch Street* (6); *Greenslade* v. *Darby* (7); *Stebbing* v. *The Metropolitan Board of Works* (8); *Wood* v. *Leadbitter* (9); *Churton* v. *Frewen* (10); *Davey* v. *Hinde* (11); *Rex* v. *Dr. Tristram* (12); *Groves* v. *The Rector of Hornsey* (13); *Reg.* v. *The Justices of Manchester* (14); *Gould* v. *Gapper*. (15)]

Lord Robert Cecil, *K.C.*, and *Kempe*, for the respondents, the vicar and churchwardens of Holy Trinity, Stepney. Faculty causes are in the nature of proceedings in rem: *In*

(1) (1869) L. R. 4 Q. B. 407.
(2) (1794) 1 Hagg. Cons. 198, at p. 202.
(3) (1830) 3 Hagg. Ecc. 4, at p. 9.
(4) (1829) 2 Hagg. Ecc. 417.
(5) (1825) 2 Add. 419.
(6) [1896] P. 95.
(7) (1868) L. R. 3 Q. B. 421.
(8) (1870) L. R. 6 Q. B. 37.
(9) (1845) 13 M. & W. 838.
(10) (1866) L. R. 2 Eq. 634.
(11) [1901] P. 95.
(12) [1901] 2 K. B. 141; [1902] 1 K. B. 816.
(13) (1793) 1 Hagg. Cons. 188.
(14) [1899] 1 Q. B. 571.
(15) (1804) 5 East, 345; 7 R. R. 766.

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re St. Albans Abbey, Gibbs v. *Lord Grimthorpe* (1), a decision by Sir Francis Jeune, sitting as Chancellor of the Diocese of St. Albans; notes to *The Duchess of Kingston's Case* (2); see *Ballantyne* v. *Mackinnon* (3); and the decrees made for the issue of faculties are definitive sentences—*Dearle* v. *Southwell* (4)—not to be reheard or set aside by the Courts which have made them, except in the case of their having been obtained by fraud, in which case alone they may be reheard, and, if on the rehearing there appears good cause for so doing, revoked: *Butt* v. *Jones* (5), *Fuller* v. *Lane* (6), *Archer* v. *Sweetnam* (7), *Groves* v. *The Rector of Hornsey* (8), *Walter* v. *Gunner and Drury* (9), *Knapp* v. *The Parishioners of St. Mary, Willesden* (10), and *Philips* v. *Halliday* (11), in which last case the dictum of Sir John Nicholl as to a faculty being good even against the Ordinary was cited with approval: *Greathead* v. *Bromley* (12); *Marriot* v. *Hampton.* (13) If the appellants are right, it would not only have been necessary in certain cases to presume a lost faculty, but also that that faculty had never been revoked. Of this there is no trace. If, however, the Court below or this Court had power to revoke the faculty here, it would be wrong on the merits to do so. The faculty was properly granted. The exception in the 3rd section of the Disused Burial Grounds Act, 1884, must be construed liberally, and, so construed in favour of the objects excepted, includes all the buildings objected to by the petitioners. All the purposes for which the hall will be used could be properly carried out in the church: see Bingham's Christian Antiquities, vol. ii, bk. viii. c. 10, s. 1; canon 88 of 1603; and a much wider meaning must be given to the word "church" than that of a place solely

(1) Nomine "In the matter of a petition of Mr. H. H. Gibbs for a faculty to repair, restore, and refit certain parts of the cathedral church of St. Albans." *The Times*, Nov. 25, 1889.
(2) (1776) 2 Sm. L. C. 731, at p. 809.
(3) [1896] 2 Q. B. 462.
(4) (1755) 2 Lee, Ecc. 119.
(5) 2 Hagg. Ecc. 417.
(6) 2 Add. 419, at p. 431.
(7) (1724) Fortes. 346.
(8) 1 Hagg. Cons. 188.
(9) (1798) 1 Hagg. Cons. 314, at p. 322.
(10) (1851) 2 Rob. E. 358.
(11) [1891] A. C. 228, at p. 235.
(12) (1798) 7 T. R. 455; 4 R. R. 490.
(13) (1797) 7 T. R. 269; 4 R. R. 439.

appropriated to divine services. Thus the tower has been held to be part of the church: *Rex* v. *Wheeler*. (1) So the vestry: *Reg.* v. *Evans* (2); *Wing* v. *Taylor* (3); *Wilson* v. *McMath* (4); 36 & 37 Vict. c. 50, s. 1. A church may be accurately described as a place appropriated for religious duties or purposes: Degge's Parson's Counsellor, ch. xii. (ed. 1820), p. 200. And this being so, how can a building physically connected with the church, and on the undisputed facts an enlargement of it, to be used for the same purposes, be illegal under the Act of 1884?—*Reg.* v. *Raffles* (5); *Humphery* v. *Young* (6); Gibson, vol. i. ch. iv. p. 191.

[The remainder of the arguments on both sides were in substance the same as those in the Court below.]

Danckwerts, K.C., replied.

Cur. adv. vult.

Aug. 5. SIR LEWIS DIBDIN. In September, 1900, a faculty was granted out of the Consistory Court of London for certain additions to the parish church of Holy Trinity, Stepney, comprising, amongst other things, a new chancel, the erection of vestries at the south end (the conventional west end) of the church, and the erection of a parish room over the vestries. This faculty was granted after a hearing in Court with oral evidence. On June 27, 1901, another faculty was granted on the petition of the applicants for the first faculty —namely, the vicar and churchwardens—varying the first arrangement and providing for the erection of a larger hall, 80 feet long and 40 feet broad, capable of seating 240 persons, abutting on the church on its north side immediately behind the chancel and former north (the conventional east) end of the church. The new plan attached to the petition for this second faculty shews an extension of the chancel so as to make the south wall of the hall serve as the north wall of the church. It also provided for new vestries on the east side of the church (in lieu of those authorized by

(1) (1829) 3 C. & P. 585.
(2) (1842) Car. & M. 298.
(3) 2 Sw. & Tr. 278.
(4) 3 Phillim. 67, at p. 82.
(5) (1875) 1 Q. B. D. 207.
(6) (1903) 72 L. J. (Q.B.) 6.

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the first faculty), and for lavatories and a kitchen on the east and west sides of the new hall. The faculty of June 27, 1901, which is described as supplemental to that of September, 1900, expressly authorizes the building of the vestries and hall as shewn on the plan, but, apparently by an oversight, does not refer to the extension of the chancel shewn in the plan, although this extension differs entirely from the new chancel shewn in the plan annexed to the first petition and sanctioned by the first faculty. The extension shewn in the plan annexed to the petition for the second faculty is plainly intended as a substitution for the new chancel shewn in the first plan, the addition of the hall on the north side of the church having rendered the original scheme impracticable. All the buildings were to be erected on the churchyard surrounding the church, which was closed many years ago, and until recently was under the care of the London County Council, and was kept by them as an open space and garden for the use of the public. This second faculty was granted in chambers after citation, to which no one appeared; so that there was no opposition. After the second faculty the vicar and churchwardens began to build the hall and some of the other buildings I have mentioned. In March, 1902, when the works had made some progress, the London County Council presented a petition in the Consistory Court of London asking that the second faculty might be revoked or amended so as not to authorize the erection of buildings in the disused churchyard, contrary to the Act of Parliament to be presently mentioned. The petition came on for hearing before the learned Chancellor of the Diocese of London on several days in May and June, 1902, and on July 31, 1902, he delivered judgment, in effect dismissing the petition without costs, and confirming the faculty with certain modifications. This is an appeal from that order. There are two questions to be considered. First, whether the buildings authorized by the faculty of June 27, 1901, are or are not an enlargement of the church within the meaning of the 3rd section of the Disused Burial Grounds Act, 1884, which enacts that—[THE DEAN OF THE ARCHES read the section, and continued:—] The second

question is whether the Consistory Court or this Court can on this application revoke or vary the faculty granted in June, 1901, which issued after citation, and as to which there has not been and now cannot be an appeal. If this second question is answered in the negative, it might be possible to dispose of this case without dealing with the first question. But as both points have been fully argued, and they may be of importance in other cases, I think it well that I should state my opinion on the whole matter.

The first question is largely one of fact. The new building must, it seems to me, satisfy two conditions in order that it may be an enlargement of the church within the meaning of the Act. First, it must have such physical communication with the church as to make it fair to describe it as an enlargement of the original building. Secondly, the purposes for which the building is designed must be the same as those of the church in its unenlarged state. It would, for instance, be inaccurate to call a theatre built on to and connected by doorways with a church an enlargement of it. The buildings authorized by this faculty are of two kinds. So far as they consist of choir and clergy vestries—that is, moderate-sized rooms in which those who have to take part in the services may robe and unrobe—I do not think there can be any doubt that they are a mere enlargement of the church within the meaning of the Disused Burial Grounds Act, 1884. But more difficulty arises with regard to the parish hall and its accessories. As I have said, it is proposed to extend the church proper, if I may use the expression, so as to make it and the hall one continuous building, and internally the south wall of the hall will be a party wall between it and the church. There will be one or two doors leading from the church or vestries into the hall. The hall is finished and in use, but the extension of the chancel and the new vestries have not yet been built. There is an interval of a foot or two between the present end of the chancel and the hall, but there is communication between the two by a temporary passage. There was a good deal of evidence and discussion in the Court below as to the real intentions of the vicar and churchwardens as to extending the chancel in the

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way I have described; but the Chancellor thought, as I think, that the scheme shewn in the plan referred to in the second faculty represents the bonâ fide intentions of the parties which they are trying to carry out completely. I think the faculty must be taken, though not very accurately worded, to authorize the whole of this scheme, including the extension of the chancel; and I will assume that when the buildings are finished there will be nothing in their appearance or physical condition to make it impossible to regard them as parts of the church.

The vicar and churchwardens gave evidence in the Court below as to the purposes for which the hall is needed. It is to be a mission or parish hall of a perfectly familiar type in well-worked town parishes. The parish is a very large one. There are 17,000 inhabitants, and, as the vicar expressed it, "The people are without a place to meet in." The hall is needed, he says, for "children's services, Mothers' Union meetings, Church of England Help Society, Girls' Friendly Society, mothers' meetings, Guild meetings for communicants, Sunday and Church day schools, prize-giving, and all other spiritual and moral purposes." The faculty of June 27, 1901, authorized the use of the hall "as a vestry, and for Sunday schools and mission services and other parochial purposes." In the order now under appeal these purposes were put out in greater detail, with the addition that the hall may be used "for other ecclesiastical purposes, but not for any secular purpose."

The learned Chancellor of the Diocese of London seems to have been of opinion that because vestry meetings may be held in the hall, and it communicates with the church by a door and is built on consecrated ground, it is part of the church itself. He cited *Wing* v. *Taylor*. (1) In that case a marriage had taken place in the vestry room of an ancient church which communicated with the church by a door, and it was decided that this particular vestry was primâ facie part of the church, and, no evidence having been adduced to the contrary, it was held that the marriage had been solemnized in the church.

(1) 2 Sw. & Tr. 278.

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No doubt a vestry may be part of a church, and there are many instances, some of which were referred to at the hearing, where rooms of considerable size used for holding vestry meetings are structurally, and have for generations been treated as, portions of ancient churches. But it is a wholly different matter to say that every building, however large, which has a door opening from it into a church is a part of the church because vestry meetings may occasionally be held in it. This hall will hold more than 200 people, and is, therefore, I need not say, quite unnecessarily large for an ecclesiastical vestry room of a parish even as populous as this one. Ecclesiastical vestries are not frequently held, and are not usually attended by many persons. For example, in this parish it appears that the Easter vestry is often the only one held in the year. There was a special vestry to approve the erection of the hall, and it was attended by twenty parishioners only. The Act 13 & 14 Vict. c. 57, ss. 1, 2, 3, provides machinery by which the holding of vestries in churches may be prohibited on the ground that it is "productive of scandal to religion and other great inconveniences." Clearly, therefore, vestries may be held elsewhere, and the mere holding them in a room built on to a church, even though built for that express purpose, will not of itself make the room part of the church.

The case has not, however, been put on this ground only by counsel for the respondents. It is said that the words of the faculty, with or without the modifications introduced by the order under appeal, restrict the user of the hall to purposes which would be lawful purposes for the employment of the church itself. I will assume that it is so. But it seems to me to be one thing to say that a church may without offence be used for these purposes, and quite a different thing to say that a building erected specifically for these purposes is an enlargement of a church if it is in physical communication with it. The primary purpose of a church is the solemnization of the services of the Church. A church is defined in Johnson's Dictionary as "the place which Christians consecrate to the worship of God." The very enactment under consideration couples churches with "other places of worship." If we understand

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worship to include the administration of the sacraments, marriages, burials, churchings, and the other occasional services, no better description of a church can be given than "a place of worship." This hall is useless for the purpose of worship in the church. Persons sitting in the hall could neither see nor hear what was going on in the church. Further, it may be conceded that a church must generally have in connection with it not only robing vestries, but also offices, e.g., a coal cellar or a heating chamber, and that these, if comprised in the same building as the church, are parts of it. They are all incident to the carrying on of the services. But this hall serves no such ancillary purpose, except possibly on some special occasion when the vestry rooms authorized by the faculty may be insufficient for a great gathering of clergy to robe in. The same fallacy runs through the argument derived from the proposed use of the hall for meetings, Sunday schools, &c., as through that founded on its use for vestry meetings. It does not follow because these uses are each one of them legally permissible in a consecrated building that the hall which is devoted to these uses is an enlargement of the church. Meetings, Sunday schools, vestries, &c., may be held, and generally are held, elsewhere than in a church. On the other hand, this hall is not fitted up for and is not intended to be used for the public worship which is the primary purpose of a parish church, and which can only be carried out in a building set apart for it by consecration or otherwise. It seems to me that this hall, which does not serve directly or indirectly the primary purpose of a church, cannot be deemed an enlargement of the church, because it serves other purposes which, although not unlawful in a church, can equally well be carried out elsewhere. In my opinion, that is not the meaning of this Act of Parliament. When it speaks of a building erected for the purpose of enlarging a church, I think it means enlarging it for its main and primary purpose of public worship. Any other construction would make the Act fail of its professed object. For, independently of the Act, no building for secular purposes could be lawfully erected in a churchyard; and if it were true that any building added on

to a church, so long as its purpose is not secular, is an enlargement of the church within the meaning of the Disused Burial Grounds Act, 1884, that statute would have left matters very much where they were before.

It follows from what I have said that, in my opinion, the faculty, so far as it authorizes the hall to be built on the churchyard, ought not to have been granted. In other respects it seems free from objection. If, therefore, this was an appeal from the order decreeing that faculty, I should feel bound to allow the appeal to the extent I have indicated. But I have now to consider the second question whether the London County Council's petition for an order revoking or varying the faculty of June 27, 1901, can be entertained. If my view upon the first point be well founded, the faculty in question is to a certain extent contrary to the provisions of a statute and invalid. It may be that by proceedings elsewhere the London County Council can assert the invalidity of the faculty in an effective way. But it by no means follows because the Court below granted the faculty erroneously and misconstrued, as I conceive, the Act of Parliament, that the Court below or this Court has any power to entertain this petition, which invites the Court to rehear a matter which it has already solemnly decided and to reverse its former decision.

The petition of the London County Council prays that the faculty of June 27, 1901, may be revoked or amended by the Court which granted the faculty. It was decreed on a petition by the vicar and churchwardens. Citation was issued and published in the usual way. The council did not appear to oppose the application. There has been no attempt to appeal from the decree of the Chancellor granting the faculty. It had been acted on, and the buildings authorized by it were in course of erection when the council presented their petition. It is in reality an application for a rehearing of the petition on which the faculty was granted by persons who might have appeared to the citation, and have opposed its being decreed, but did not do so, and this application was made long after the time for appealing had expired and after expense had been incurred on the faith of the faculty. It

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is alleged in the pleadings, and not denied, that the council was not ignorant of the intended application for a faculty. Certainly there had been correspondence between the council's officers and the vicar which disclosed his desire to build the hall on the churchyard, and the churchyard was in the actual custody of the council as an open space until required for the building operations. As I have said, citation was duly published on the church door, and the object of citation is not only to give those interested an opportunity to oppose if they wish to do so, but also to bind them if they do not appear. The citation in this case stated that if no appearance were entered nor sufficient cause shewn, the faculty would be granted, and it is well-known practice in the Ecclesiastical Courts to proceed as it is called in pœnam in the absence of a party who has been cited and has not appeared: see, e.g., *Reg.* v. *Baines* (1); *Dasent* v. *Dasent* (2); *Elphinstone* v. *Purchas.* (3) The faculty of June 27, 1901, was, it seems, granted by the learned Chancellor in chambers without a hearing in Court, and was treated as coming under the category of unopposed faculties for minor alterations, for which a reduced scale of fees is provided under an Order in Council of June 28, 1895. These are mere matters of practice in the particular Consistory Court, and do not alter the effect of the faculty when once issued. A faculty is precisely the same in its nature and force, whether it has been granted in Court or in chambers, and whether charged for as a minor faculty or not. The question then is whether, after a petition for a faculty has been heard and the faculty asked for has been granted, it is competent for the Court, on a suggestion that it has misconstrued an Act of Parliament, to rehear the matter, to reconsider its own decree, and if it thinks fit to revoke the faculty it has granted even after it has been acted on by the parties who obtained it. I need hardly point out that the exercise of such a power might lead to inconvenient results. It is difficult to see how any one would be safe in incurring expense on the faith of a faculty which, although originally

(1) (1840) 12 A. & E. 210. (2) (1850) 1 Rob. E. 800.
(3) (1870) L. R. 3 A. & E. 66.

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unopposed and although all times for appealing have long expired, may yet be revoked on the application of an adversary who thus tardily takes action. No such power resides in the Chancery or King's Bench Divisions of the High Court of Justice. The judges of the High Court of Chancery had, it is true, jurisdiction to rehear causes. It was the result of that Court's peculiar history, and was strictly limited by rules as to the time of its exercise. But, to quote Thesiger L.J. (*In re St. Nazaire Co.* (1)): ". . . . nothing can be clearer than that there was nothing analogous to that in the Common Law Courts, and it is equally clear that under the Judicature Act, after once the Common Law Division of the High Court of Justice has pronounced a decision upon the matter in dispute which is being litigated between the parties, there is no power in that Division of the High Court to rehear or review that decision upon any suggestion that it has been misled, or that the parties have not brought all the evidence which ought to have been brought in order to enable the Court to arrive at a just conclusion": see also *Marriot* v. *Hampton* (2); *Greathead* v. *Bromley* (3); *Hebbert* v. *Purchas.* (4) With regard to the Ecclesiastical Courts, I think the right view is that a decree made in a faculty suit after citation binds all persons who have or might have appeared in the suit, so that to allow any person who has, or who might have so appeared, afterwards to initiate fresh proceedings for the purpose of getting the matter reheard, and of reversing the decree previously made, would be against sound principle. I am unaware of any such practice in the Church Courts, and I can find nothing in the books to give countenance to the notion of its existence. On the contrary, the cases point strongly the other way. Sir John Nicholl in *Fuller* v. *Lane* (5) gave as a reason why pew faculties should be granted with caution that, "if once issued," they would be "good and valid even against the Ordinary himself": in other words, he

(1) (1879) 12 Ch. D. 88, at p. 101 [and see *Charles Bright & Co.* v. *Sellar*, [1904] 1 K. B. 6].
(2) 7 T. R. 269; 4 R. R. 439.
(3) 7 T. R. 455; 4 R. R. 490.
(4) (1871) 7 Moo. P. C. (N.S.) 551.
(5) 2 Add. 419, at p. 431.

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thought a faculty could not be revoked by the Court which granted it. Sir John Nicholl's words are cited with apparent approval by Lord Herschell in *Philips* v. *Halliday*. (1) Again, Dr. Lushington, in *Knapp* v. *The Parishioners of St. Mary, Willesden* (2), said: "If a pew be held by a faculty or prescription, a Court cannot disturb the possessor; it cannot interfere so as to defeat that right. Were it to attempt so to do by granting a faculty without a proviso to protect an existing right, the faculty would be void." Finally, there is a case (*Gibbs* v. *Lord Grimthorpe*), reported only, I think, in *The Times* newspaper of November 25, 1889, in which Sir Francis Jeune, then Chancellor of the Diocese of St. Albans, had to consider this point on an application by Lord Aldenham for a faculty to restore the Lady Chapel of St. Albans Abbey, which was opposed by Lord Grimthorpe on the ground, which the Chancellor held to be well founded, that a faculty previously granted to Lord Grimthorpe authorized a restoration of the Lady Chapel, so that a fresh faculty would conflict with, and in fact revoke, the existing faculty. Sir Francis Jeune held that this could not be done. He said: "The principle that seems to me best to cover the whole ground is the simple one that these grants of faculties by decree of a competent Court are in the nature of judgments in rem, and that once finally and validly made they cannot be set aside or challenged in any subsequent proceeding in the same, or indeed in any, Court."

As Sir Francis Jeune points out in the judgment I have just cited, it is necessary to distinguish between a faculty to do an act—e.g., to erect an organ in a church—and a faculty which it is plain from its terms or from the nature of the thing permitted is a licence not only to cause something to be done, but also to retain the state of things thus produced. The St. John's, Margate, case (*The Churchwardens of St. John's, Margate* v. *The Parishioners of the Same* (3)) and *Jay* v. *Webber* (4) are cases of the former kind. In each of them the faculty merely authorized the erection of an organ, and this,

(1) [1891] A. C. 228, at p. 235.
(2) (1851) 2 Rob. E. 358, at p. 364.
(3) 1 Hagg. Cons. 198, at p. 202.
(4) 3 Hagg. Ecc. 4.

as was pointed out in the judgments, would not be inconsistent with a subsequent faculty to remove the organ under altered circumstances. Possibly the present faculty, which must contemplate the retention as well as the erection of the hall, would not prevent the grant of a faculty to remove or alter the hall at some future day if new conditions should render that course desirable. But this application is not for the removal or non-retention of the hall, but for the revocation of the faculty authorizing its erection, and it is made so shortly after the grant of the faculty that the erection of the authorized buildings is actually not completed. It is therefore, in substance as well as in form, inconsistent with the faculty of June 27, 1901. Of course a faculty may be voluntarily surrendered, and it is always therefore open to the Court to revoke or alter a faculty with the consent of all the parties interested. But the one case in which the Court may revoke a faculty without consent is where it has been obtained surreptitiously or by some other fraudulent device. It would seem that the same exception is recognised in the High Court of Justice: see *Ward & Co.* v. *Wallis*. (1) But in this Court there is express authority in *Butt* v. *Jones*. (2) That case was another pew suit heard before Sir John Nicholl. It was argued by Mr. Danckwerts that the decision was based, not only on the fraud of the person who had obtained the faculty, but also as an independent and separately sufficient ground, on the view which Sir John Nicholl entertained of the undesirable nature of the faculty. But I do not think, having regard to the same learned judge's dictum in *Fuller* v. *Lane* (3), which is cited by him in *Butt* v. *Jones* (4), the latter case can be properly regarded as an authority for any larger proposition than that in support of which I have quoted it. The pleadings in this suit raise a case similar to that of *Butt* v. *Jones* (4); but at the trial there was no evidence to support it, and any suggestion of fraud, or of an attempt to mislead the Court on the part of the applicants for the faculty of June, 1901, was definitely, and, if I may say so, very properly, repudiated

(1) [1900] 1 Q. B. 675, at p. 678.
(2) 2 Hagg. Ecc. 417.
(3) 2 Add. 419, at p. 431.
(4) 2 Hagg. Ecc. 417.

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by counsel for the London County Council. It was argued that a faculty is a licence and that every licence is revocable; but I do not think a faculty is at all on the same footing as a licence granted by one individual to another. *Wood* v. *Leadbitter* (1), the leading case on this point, related to a licence given by one person to another to go upon land, and it was held that such a licence, unless connected with a grant, would not create an interest in the land and was revocable. Alderson B. referred to *Thomas* v. *Sorrell* (2) and to Brooke's Abridgment, vol. ii. p. 65 (ed. 1573, Part II. f. 65), as containing the law on the subject. It is plain from the latter authority, which deals with the point of the revocability of a licence, that a licence between individuals was alone under consideration. The title of the chapter is: "Licenses grauntes de un a autre entre subjects." But a faculty derives its force from the decree of a competent Court made in a judicial proceeding by a judge after hearing evidence. The principles which govern other judicial proceedings are applicable, and I am unable to perceive any reason for holding that because the order made in a faculty suit is permissive and not obligatory, that therefore it must be revocable also.

Mr. Daldy pressed upon me that this faculty was a mere nullity, a piece of waste paper, and that on that ground it was competent for the Court to call it back. It is, no doubt, stated in the books of practice (see Oughton, Part I. tit. cxxviii. and Conset's Practice, ed. 1708, p. 228) that a "nullity" in an ecclesiastical suit may be complained of before the judge who has committed it, and "if it is satisfactorily proved he is bound and is accustomed to revoke the same." But by nullity in this context is meant some error of procedure (several illustrations are given in Oughton) which makes the suit null; and the practice was that in any later proceeding in the suit, as, for instance, an attempt to execute the sentence, it was open to the party aggrieved to allege the nullity as a bar to such further proceeding. But I do not think that has any reference to this case. Alleging a nullity before the judge does not mean initiating a new suit

(1) 13 M. & W. 838. (2) (1672) Vaugh. 330, at p. 351.

which has no purpose except to procure from the Court a declaration of the invalidity of a decree in a previous suit. It means that, if in a suit which has some basis independently of this question you are hampered by a previous sentence which you think is invalid, you may invite the judge to ignore it, and if he is satisfied that it is a nullity he may do so. In the first place, the proceeding in which the nullity occurred is over, and this petition to revoke the faculty is in a new and distinct suit for the purpose of annulling what was done in the previous suit. Secondly, there has been no such nullity here as Oughton describes. All that can be said is that, if I am right, the statute, properly construed, makes the faculty inoperative so far as it authorizes the erection of the hall. But in other respects the faculty is effective. It is not, therefore, a nullity. In my opinion the case of the London County Council, as presented at the hearing, is misconceived, and was rightly refused by the learned Chancellor, though I differ from him as to the reason for doing so. I observe that the order of the Court below does not merely dismiss the petition, but modifies, or, at any rate, explains, the terms of the faculty, and purports to provide a summary mode of application to the Court to enforce the observance of the limitations of the faculty. Taking, however, the view that I do of the invalidity of the faculty, so far as the hall is concerned, as being inconsistent with the Disused Burial Grounds Act, 1884, I think the right course will be to vary the order by omitting the provisions I have referred to which might be taken to reaffirm the faculty as to the hall, and merely to dismiss the petition without costs. The suit may, if necessary, be remitted to the Consistory Court of London with this intimation. The vicar and churchwardens, though they raised in their pleadings the point on which they have succeeded here, did not argue or rely upon it in the Court below; and I think, therefore, that there should be no order as to the costs of this appeal.

Solicitor for appellants: *Blaxland.*

Solicitors for respondents: *Alfred Howard; Milles, Jennings, White & Foster.*

C. F. J.

1903
July 25;
Oct. 2.

[IN THE CONSISTORY COURT OF YORK.]

NOBLE *v.* REAST AND ANOTHER.

Ecclesiastical Law—Citation in Civil Suit to appear and shew Cause why a Monition should not issue to remove Ornaments introduced into Parish Church without a Faculty—Allegation of Interest—Insufficiency of Interest—Secretary of Archbishop—Sequestrator during Vacancy of Benefice.

The churchwardens of a parish in the diocese of York, the incumbency of which was vacant by the resignation of the last incumbent thereof, were cited to shew cause why a monition should not be issued calling upon them to remove out of the parish church certain ornaments introduced there without the authority of a faculty. The promoter in the suit was not a parishioner of the parish, but was described in the citation as "Thomas Shepherd Noble, of the city of York, solicitor, secretary to His Grace the Archbishop of York and Ordinary of the Diocese of York." It further appeared, by evidence at the hearing, though not disclosed on the face of the citation, that the promoter had been appointed and was at the time when the citation issued sequestrator of the living during the vacancy:—

Held, that the suit must be dismissed, as the promoter had not the interest required by law to entitle him to promote the suit.

Lee v. *Fagg*, (1873) L. R. 4 A. & E. 135; (1874) L. R. 6 P. C. 38, followed.

THIS was a civil suit in which, on June 6 last, the promoter, Thomas Shepherd Noble, of the city of York, solicitor, secretary to the Archbishop of York, prayed a citation calling upon George Thomas Reast and Joseph Clarke, the then churchwardens of the parish of Christ Church, Doncaster, in the diocese of York, to shew cause why a monition should not be issued against them to remove or cause to be removed out of the parish church of Christ Church, Doncaster, certain specified ornaments alleged to have been introduced into that church without the authority of a faculty.

A citation as prayed was decreed in the suit, and issued on June 25 last. It recited that it had been represented to the Chancellor of the Consistory Court of York by the proctor of "Thomas Shepherd Noble, solicitor, secretary to His Grace the Archbishop of York and Ordinary of the Diocese of York,"

that during the incumbency of Edgar Lee, clerk, late vicar of Christ Church, Doncaster, certain ornaments were introduced into that church without a faculty; that such ornaments, to wit, two small tables used as altars, standing one on each side of the entrance to the chancel of the said church, two statuettes placed near the said tables with lamps in front of them, and pictures of the Stations of the Cross placed round the walls of the said church, still remained in the said church; and that the said church of Christ Church, Doncaster, was then vacant by the resignation of the said Edgar Lee, the last incumbent thereof, on the 12th of March, 1903. The citation then authorized and commanded that the above-named churchwardens should be cited to appear "to shew reasonable and lawful cause, if they have or know any, why a monition should not issue against them to take away and remove, or cause to be taken away or removed, from the said church all the said additions, furniture, and ornaments of the said church as aforesaid" [enumerating them], "and to obey the law in all things at the promotion of the said Thomas Shepherd Noble."

The citation having been duly served, the churchwardens appeared as respondents in the suit, and on their behalf a responsive allegation was brought in, the 2nd paragraph of which was in terms as follows:—

"The respondents submit that the said T. Shepherd Noble has no interest in the subject-matter of this suit, and, further, that the citation does not on the face of it disclose any such interest, and they deny that he has any interest cognizable by this Court or entitling him to promote this suit. Wherefore the respondents humbly pray the Court to dismiss them from the suit with costs."

As to the merits of the case, the responsive allegation stated that the ornaments mentioned in the citation had been placed in the church before either of the respondents had been appointed churchwardens, and that none of such ornaments had been introduced by the respondents or either of them, and that the monition prayed for should be refused with costs.

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1903. July 25. The cause came on to be heard before the Chancellor of the Diocese of York (Charles Alfred Cripps, K.C.).

The promoter, being called as a witness on his own behalf, gave evidence that he was the legal secretary of the Archbishop of York, and in taking the proceedings in the suit acted under the archbishop's instructions; that on June 13 last he had been appointed by the archbishop, and still was, sequestrator of the living of Christ Church, Doncaster, during the vacancy of the incumbency, which had not yet been filled; and that it was his duty as sequestrator to take charge of the temporalities of the living, and to provide for the services of the Church being performed in the absence of any special orders from the archbishop.

Wragge appeared for the promoter. The respondents will rely on *Lee* v. *Fagg* (1); but except so far as relates to the general principle of law which the promoter admits—that some interest must be shewn to entitle a person to maintain a civil suit in which a monition is claimed—that case is of no authority in the present instance. For, first, the church from which it was sought to remove the ornaments objected to in *Lee* v. *Fagg* (1) was full, whilst in the present case it is vacant; and, secondly, there the character in which the promovent sued was not disclosed on the proceedings—contrary to the case here, where the interest of the promoter as secretary to the archbishop, and therefore officially instructed to bring the suit, is fully stated on the face of the citation. Moreover, as sequestrator the promoter has the same proprietary interest in the ornaments and furniture in the church as the new incumbent and churchwardens will have when the new incumbent is appointed; and this interest alone, it is submitted, is sufficient to enable him to maintain the suit.

Hansell appeared for the respondents. Neither as secretary of the archbishop nor as sequestrator has the promoter the interest which the law requires to enable him to promote the present suit, and under the rulings of the Court of Arches

(1) L. R. 6 P. C. 38.

and the Judicial Committee in *Lee* v. *Fagg* (1) the respondents are clearly entitled to have the suit dismissed; the interest required to be alleged in civil suits being a personal proprietary interest, as that of a parishioner, and not an official interest. [He referred to *Liddell* v. *Beal* (2); Prideaux on Churchwardens, ed. 16, p. 234; *Hansard* v. *The Parishioners of St. Matthew, Bethnal Green* (3); *Davey* v. *Hinde*. (4) Even, however, if an official interest was sufficient, the official interest relied on in the present case is not disclosed on the proceedings, the citation only containing a statement that the promoter is the secretary of the archbishop, and being entirely silent as to his appointment as sequestrator. The citation cannot now be amended in this respect. Moreover, the respondents as churchwardens have the care of the goods of the parish: *Hutchins* v. *Denziloe* (5); *St. Thomas's Hospital* v. *Trehorne* (6); and the appointment of a sequestrator does not interfere with their duties on this head.

THE CHANCELLOR. This case is an important one, and embraces a question which, so far as I know, has never heretofore been directly determined. But I have had the advantage of full assistance from two members of the Bar who are cognizant of questions of this kind, and, having regard to that assistance, and having made up my mind, I am prepared to express my judgment, and if either party wish to have it questioned, they can go elsewhere. Now the facts here are these: Certain representations have been made to the archbishop in reference to this church at Doncaster — Christ Church, Doncaster. A letter was referred to by Mr. Wragge, evidently an answer to one from the archbishop to these representations, which shews that questions have arisen over a series of years in connection with the services at Christ Church, Doncaster. On May the 14th of this year the vicar, Mr. Lee,

(1) L. R. 4 A. & E. 135; L. R. 6 P. C. 38.

(2) (1860) 14 Moo. P. C. C. 1, at p. 12.

(3) (1878) 4 P. D. 46, at p. 54.

(4) [1901] P. 95.

(5) (1792) 1 Hagg. Cons. 170, at p. 173.

(6) (1752) 1 Lee Ecc. 126, at p. 129.

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having previously resigned his living, went over to the Church of Rome. Shortly after the vicar's resignation the archbishop visited the church and asked the churchwardens, Mr. Reast and Mr. Clarke, to meet him at the church. Now it does not seem to me anything in itself turns upon what passed between the archbishop and the churchwardens on that occasion, because we are not dealing with the archbishop in his position as visitor at all—that does not arise in this case; but, judging from the subsequent correspondence, there appears to have been some difference of recollection, and I should come to the conclusion myself, if it were necessary, that the churchwardens, though perfectly bonâ fide, did not appreciate the attitude of the archbishop in the view which he then expressed. The letters shew that whatever might have been the former condition of affairs, certain matters of illegality having been called to the attention of the archbishop as diocesan, he was desirous, and properly desirous, that these illegalities should come to an end. The particular illegality, about which there could be no question whatever, is that certain ornaments had been put up in the church without a faculty. Throughout the correspondence the archbishop is pointing out the illegality; and it was the clear duty of the churchwardens to take steps to have that illegality remedied and matters put on a proper footing. This was not done. Subsequently to the citation issued in the suit promoted by Mr. Noble, there has been brought in a petition of the churchwardens for a confirmatory faculty dated July 17. This petition cannot be formally entertained at the present time, but it indicates that the churchwardens are prepared to take such steps as they are advised are right in order to comply with legal requirements. On June 13 Mr. Noble was appointed sequestrator in the place of the churchwardens, and the sequestration was published on June 15. Considerable discussion has arisen here as to what is the position of a sequestrator. I hold that Mr. Hansell is right that, whatever might be the position of a sequestrator, I could not at this stage amend the citation. In my opinion, as it has been argued before me, I see nothing in the duties or official position of a sequestrator which would

give him an interest to promote a suit if he had not got that interest aliunde. In other words, a sequestrator is in the position of a business representative who has to collect the income of the living—has to deal with the interest of the incoming vicar, and meanwhile provide sufficient funds for the proper performance of the services. Then on June 25 the citation was issued, and it appears on the face of the citation that Mr. Noble is not acting in an individual capacity, but that he is acting "as secretary to His Grace the Archbishop of York and Ordinary of the Diocese of York." It has been argued before me to-day that there is not sufficient interest in Mr. Noble, acting as secretary of the archbishop, to allow him to promote a civil suit of this character.

The real question is, Has the secretary of the archbishop a sufficient interest as the promoter of a civil suit? First of all it is essential—and I am governed in this matter by the decision in *Lee* v. *Fagg* (1)—to draw a distinction between a civil and a criminal suit. In a civil suit the promoter, who is not a parishioner, must shew that he has some special interest. In the case of *Lee* v. *Fagg* (1) the living was full at the time of the suit being promoted. Mr. Lee, on the face of the monition, appeared merely as a gentleman having the address of 2, Broad Sanctuary, Westminster, and I think Mr. Wragge is justified in the criticism he makes, that so far as that case is concerned it is not conclusive, because we have to consider additional elements in this case which were not present there. What are these additional elements? They are twofold. First of all, the living was vacant at the time of bringing the suit; and, secondly, the citation is made here on behalf of Mr. Noble, the promoter, as secretary to his diocesan. I do not think any other distinctions have been suggested. These are important distinctions. Where there is an admitted illegality, there is no agency more suitable than the bishop of the diocese acting through his diocesan Court. Now during the vacancy of a living, what is the position of the bishop? Of course, in old days the bishop was what is sometimes called

(1) L. R. 6 P. C. 38.

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"universal incumbent." In later times the form of institution (I think I am right in saying the form of institution) shews that the bishop apparently had a special interest during the vacancy of the living. Still, I have come to the conclusion that whatever the true interest of the bishop during the vacancy of a living may be, that interest is not such an interest as has been referred to as essential in a case of this kind. If there is no such interest in the bishop, it follows there is no such interest in the secretary of the bishop, as the secretary of the bishop can have no greater interest than the bishop himself. Therefore I come to the conclusion that Mr. Hansell is justified in the objections he has taken as regards the want of interest in Mr. Noble to promote this suit, and I do not think it is open to me to draw a distinction between this case and the case of *Lee* v. *Fagg* (1), although, of course, it is open to the Appellate Courts to say that the distinction which Mr. Wragge has pointed out is sufficient to distinguish the two cases. Under these circumstances, and having indicated what my judgment is upon the immediate point under discussion, the question arises how this case should be left. During the course of the case a petition for a confirmatory faculty has, as I have already stated, been brought into this Court on behalf of the churchwardens, and this petition, when heard, will enable the whole matter which it was intended to raise in this case to be brought before the Court. The present suit cannot be entertained for want of sufficient interest in Mr. Noble to promote it; but the question of costs remains to be decided. I shall not make any final and definite order formally dismissing the suit at present, but shall adjourn the hearing, so that the adjourned hearing may come on with the hearing of the confirmatory faculty, in order that I may then decide in my discretion as to the costs of the present suit.

1903. Oct. 2. The cause was again called on, and the Chancellor, having heard counsel for the promoter and the

(1) L. R. 6 P. C. 38.

respondents on the question of how the costs of the suit should be borne, made a formal order dismissing the suit without costs. (1)

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Solicitor for promoter: *T. P. Noble.*

Solicitors for respondents: *Perkins; Brooks, Jenkins & Co.*

C. F. J.

THE CHALLENGE AND DUC D'AUMALE.

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Oct. 27, 28.

Admiralty — Collision — Tug and Tow — Fog — Regulations for Preventing Collisions at Sea, 1897, *art.* 16—*Obligation on Tug to stop—Control of Tug by Tow — Judgment by Default in Foreign Country — Estoppel—Res Judicata.*

A steamship proceeding in a dense fog up the English Channel at a moderate speed on a course of E. ½ N. stopped her engines, in accordance with the second paragraph of art. 16 of the Regulations for Preventing Collisions at Sea, on hearing a fog signal apparently forward of her beam, and on hearing a second signal reversed; but she came into collision with a sailing vessel in tow of a tug proceeding on a crossing course of W.S.W. at a moderate speed of from two to three knots. The whistle of the steamship had been heard fine on the starboard bow of the sailing vessel; but the engines of the tug were not stopped in accordance with the above regulation, on the ground that as the tug was proceeding at the minimum speed compatible with keeping the tow under control, it was not the duty of the tug to stop:—

Held, by Gorell Barnes J., that the steamship was not to blame as she had complied with the rule by stopping, and was not bound to reverse before she did so; but that both tug and tow were to blame, as it was practicable for the tug to have stopped her engines and let the way run off the tow.

The Merthyr, (1898) 8 Asp. M. L. C. 475, and *The Lord Bangor*, [1896] P. 28, distinguished.

After the collision the steamship, which was a British vessel, proceeded

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(1) On the same Court day the application of the churchwardens for the confirmatory faculty referred to in the Chancellor's judgment was heard, and the petitioners asking only for the retention of one of the two Holy Tables above mentioned, and counsel on their behalf stating that the remainder of the ornaments in respect of which a monition to remove had been sought had been removed out of the church, the Chancellor after hearing evidence granted a faculty sanctioning the retention at the east end of the south aisle of the church of the second Holy Table formerly in the north aisle of the church.

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to her port of destination in Belgium, where her owners gave bail to prevent her arrest pending proceedings in a French Court by the French owners of the sailing vessel. These proceedings resulted in a judgment by default for the damage sustained by the sailing vessel against the owners of the steamship, and, under a treaty existing between France and Belgium, the French owners of the sailing ship took steps to enforce the judgment in Belgium, and the owners of the steamship appeared in the Belgian Court to resist execution. The owners of the sailing ship pleaded the foreign judgment in bar of the present action in this country :—

Held, by Gorell Barnes J., that the plea of res judicata failed, as the judgment by default of appearance did not work an estoppel in respect of the action of damage by collision brought by the owners of the British steamship against the owners of the French sailing vessel and the owners of her British tug, for the owners of the steamship, by appearing in the Belgian Court, had not submitted themselves to the jurisdiction of the French Court, and no judgment on the merits in the presence of the parties had been pronounced by a foreign Court.

The Delta, (1876) 1 P. D. 393, followed.

ACTION of damage by collision.

The plaintiffs were the Marychurch Steamship Company, Limited, owners of the *Camrose*. The defendants were the Elliott Steam Tug Company, Limited, owners of the *Challenge*, and La Compagnie Maritime Française, owners of the *Duc d'Aumale*.

The case is reported first on the question of the application of the second paragraph of art. 16 of the Regulations for Preventing Collisions at Sea (1) to the case of a tug encumbered with a tow ; secondly, on the question of estoppel by reason of proceedings in one foreign country to enforce a judgment by default in another foreign country relating to the same subject-matter as the action in this country.

The facts, so far as material, were shortly as follows :—

On June 22, 1902, about 7.45 A.M., the British screw steamship *Camrose*, of 2565 tons gross register, with engines of 190 horse-power nominal, from Ibrail to Antwerp with a cargo of grain, was in the English Channel between the Royal Sovereign Lightship and Dungeness. The wind was westerly

(1) Art. 16 : . . . . " A steam vessel hearing, apparently forward of her beam, the fog signal of a vessel the position of which is not ascertained, shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over."

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light, the tide was the first of the flood, and there was a dense fog. The *Camrose* was proceeding on a course E. ½ N. magnetic, making 2 to 2½ knots with engines working dead slow, and her whistle was being sounded a prolonged blast, when those in charge heard the fog signal prescribed by art. 15 (*e*) of the Regulations for Preventing Collisions at Sea, viz., a prolonged blast followed by two short blasts (1), apparently about two points on the port bow and a good distance off. The engines of the *Camrose* were stopped, and her whistle sounded a prolonged blast in reply. Shortly afterwards the helm was ported; but, before the order could be effectively carried out, the prolonged blast followed by two short blasts were again heard apparently more ahead, and at the same time a vessel came in sight distant between one and two ships' lengths, and bearing about a point on the starboard bow. The engines of the *Camrose* were immediately put full speed astern, and a sailing vessel which the first vessel was towing coming into sight between one and two ships' lengths off, and bearing about a point or a point and a half on the port bow of the *Camrose*, the helm was put hard-a-starboard; but the stem and starboard bow of the *Camrose* struck the tow about amidships, both vessels sustaining considerable damage. The tug and tow proved to be the *Challenge*—a British screw steam-tug of 14 tons net register—towing the *Duc d'Aumale*, a steel four-masted French barque of 2297 tons gross register, from London to San Francisco viâ Cherbourg, with a part cargo of cement and other goods.

By their defence the owners of the *Challenge* alleged that their vessel with about eighty fathoms out to her tow was heading about W.S.W. magnetic, making about two knots, and duly sounding her whistle, when those on board saw the loom of a steamship which proved to be the *Camrose* coming

(1) Art. 15: "(*e*) A vessel when towing, a vessel employed in laying or in picking up a telegraph cable, and a vessel under way, which is unable to get out of the way of an approaching vessel through being not under command, or unable to manœuvre as required by these rules shall, instead of the signals prescribed in sub-divisions (*a*) and (*c*) of this article, at intervals of not more than two minutes, sound three blasts in succession, viz., one prolonged blast followed by two short blasts . . . ."

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from the westward from two to three points on the starboard bow, and about two cables' length distant, that the whistle of the tug was again sounded and that her engines were then stopped. The owners of the *Duc d'Aumale* by their defence alleged that their vessel, in tow of the tug, was proceeding on a course S. 50 deg. W. true (about W.S.W. magnetic) "at the minimum of speed compatible with keeping her under control—viz., about two knots," and that when "the whistle of a steamship was heard by those on board on the starboard bow the *Duc d'Aumale* was kept on her course, and the whistle of the tug continued to be sounded one long and two short blasts at proper intervals. Soon afterwards the whistle was again heard, and after a short interval a steamship which proved to be the *Camrose* came in sight two to three points on the starboard bow of the *Duc d'Aumale* and about a quarter of a mile distant approaching at a high rate of speed. As the *Camrose* continued to head for the *Duc d'Aumale*, and a collision appeared to be imminent, the helm of the *Duc d'Aumale* was first starboarded and afterwards ported to ease the blow; but before the heading of the *Duc d'Aumale* was materially altered" the collision occurred.

The plaintiffs, the owners of the *Camrose*, charged the defendants with excessive speed, failing to keep out of the way, failing to slacken, or stop, or reverse, attempting to cross ahead, improper starboarding, and bad look-out.

The defendants, the owners of the *Challenge*, charged the plaintiffs with bad look-out, failing to keep clear of the *Duc d'Aumale*, porting, excessive speed, and failing to stop and reverse the engines, or to do so in due time; whilst the defendants, the owners of the *Duc d'Aumale*, further charged the plaintiffs that "Those on board the *Camrose* having heard apparently forward of the beam the fog signal of a vessel unable to manœuvre as required by the Rules for Preventing Collisions at Sea, and the position of which was not ascertained, improperly failed to stop the engines and then to navigate with caution until the danger of collision was over."

The master of the *Duc d'Aumale*, who was examined on commission through an interpreter, in cross-examination said

that when he heard the whistle of the steamer apparently about a mile away, forward of the beam, he did not give any order to the tug to stop her engines "because neither of the vessels would then have been under command of their helms; the tow-line in dragging in the water in a bight would have prevented both vessels from answering their helms at the speed (two to three knots) they were going"; and when asked whether it was his view that a sailing vessel in tow of a tug is not bound by the rules of navigation to get out of the way of a crossing ship on the starboard side, he answered that in his opinion "a vessel in tow in no case must get out of the way of a steamship . . . . It was for her (the *Camrose*) to get out of the way, not for us . . . . If it had been for us to get out of the way we could have avoided her—that is to say, in manœuvring immediately we saw her."

Laing, K.C., and *Balloch*, for the plaintiffs, the owners of the *Camrose*. The plaintiffs' vessel was not making more than 2½ knots. She was sounding her whistle for fog, and on hearing the fog signal of the tug *Challenge* she stopped. The order to port was countermanded before it had any effect, and the engines were reversed on the second fog signal being heard and the tug coming into sight. The original heading of the vessel was not altered as the starboarding, at the last moment, was to ease the blow. The *Camrose*, therefore, complied with the second paragraph of art. 16 of the Regulations for Preventing Collisions at Sea. On the other hand, a tug with a vessel in tow is, for the purposes of the rules, a steam vessel, and it was the duty of the master of the *Duc d'Aumale*, under the second paragraph of art. 16 of the regulations, to have ordered the tug to stop her engines. Again, those in charge of the *Duc d'Aumale* admit that at the material time they had the *Camrose* on their starboard bow. The crossing rule (art. 19 of the regulations) therefore applied, and the tug and tow were bound to keep out of the way. The master of the *Duc d'Aumale* admits that he could have done so.

Aspinall, K.C., and *Lauriston Batten*, for the defendants, the owners of the tug *Challenge*. The *Camrose* is to blame

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for not at once reversing. In *The Merthyr* (1) it was held that it was not sufficient for a steam vessel to have stopped under art. 16; but she should under art. 23 have at once reversed when the fog-horn of a sailing ship was heard not far off, indicating, considering the direction of the wind and the course of the steam vessel, that the sailing vessel was crossing.

[GORELL BARNES J. The facts in that case were different. Those on board the steamship *Merthyr* ought to have known that the fog-horn they heard came from a sailing vessel on the starboard tack not far off, and crossing.]

In the circumstances it also became the duty of the *Camrose*, under the note to art. 21, to "take such action as will best aid to avert collision," and, therefore, she should have reversed sooner than she did: *The Cathay*. (2) In the case of the defendants' vessel, the *Challenge*, however, the position was different. A tug and tow do not constitute a steamship for all purposes under the rules, and the fog signal, under art. 15 (*e*), of a vessel towing is the same as for a vessel not under command, for the encumbered condition of the tug is to be taken into account. She cannot, by reversing her engines, stop the vessel in tow, and a nautical difficulty arises in respect of her slowing down too much, as it is necessary to maintain some little way on the tug in order to keep the hawser sufficiently taut to prevent the risk of the two vessels being drawn together, the result of which would be that the propeller of the tug would be fouled by the bight of the tow-rope hanging in the water: *The Lord Bangor*. (3)

[GORELL BARNES J. The tug can sheer to one side or the other and so keep the tow-rope clear.]

[*The Knarwater* (4) was referred to.]

Carver, K.C., and *Lewis Noad*, for the defendants, the owners of the sailing ship *Duc d'Aumale*. The evidence is not trustworthy as to those in charge of the *Camrose* having stopped the engines on first hearing the whistle of the tug, and it is clear that there was a material porting without knowing the position of the *Duc d'Aumale*, though an attempt

(1) 8 Asp. M. L. C. 475.
(2) (1899) 9 Asp. M. L. C. 35.
(3) [1896] P. 28.
(4) (1894) 63 L. J. (Ad.) (N.S.) 65.

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has been made to minimise the effect of this action of the helm. For omitting to stop and for porting, the *Camrose* must be held to blame.

On the other hand, the reasons given by the master of the *Duc d'Aumale* for not ordering the tug to stop are in accordance with the view taken by the President (Sir F. H. Jeune) in his judgment in *The Lord Bangor*. (1) The learned judge says: "If a tug absolutely stops what happens? The weight of the wire rope will draw the tow up to the tug, and if it be a screw there will be risk of fouling the propeller." That case is not distinguishable from the present, and there the tow was held not to blame though no order to stop was given. The second paragraph of art. 16 applies to steam vessels that can stop, not to a tug and tow which, if going as slow as circumstances admit, cannot safely stop.

[GORELL BARNES J. The words of the rule are "stop her engines." Those words will apply to a tug.]

Yes; but the words are preceded by the paragraph "so far as the circumstances of the case admit," and, therefore, exclude a tug and tow already going as slowly as possible.

Laing, K.C., in reply. The case of *The Merthyr* (2) is not in point, for the signal given by the tug under art. 15 (*e*) may indicate a vessel towing, or a vessel employed in laying or in picking up a telegraph cable, or a vessel not under command. No obligation is cast upon a vessel hearing this signal to reverse her engines at once; all that is required is that she shall stop, and that the *Camrose* did. The second paragraph of art. 16 is imperative, and the tug should have stopped her engines, and if the barque overran her the tug could have gone on again sufficiently to keep the bight of the tow-rope out of the way of the propeller. Both tug and tow are therefore to blame, for the only question can be whether, in the circumstances, stopping is nautically impracticable, as was held, on the advice of the Elder Brethren, in the case of *The Lord Bangor* (3); but here the evidence negatives any such impossibility.

(1) [1896] P. 28, at p. 34. (2) 8 Asp. M. L. C. 475.
(3) [1896] P. 28.

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GORELL BARNES J. This is a case of a collision between the plaintiffs' steamship *Camrose* and the sailing ship *Duc d'Aumale*, which was in tow of the steam-tug *Challenge*. The defendants to the action are the Elliott Steam Tug Company, Limited, as owners of the *Challenge*, and the Compagnie Maritime Française, as owners of the *Duc d'Aumale*. There have been two statements of defence put in, one by the owners of the tug and one by the owners of the tow, and the latter set up a point, partly of fact and partly of law, which has not yet been considered. At present I am asked to deal with the facts of the case so far as the collision itself is concerned.

The collision took place on June 22, 1902, at about 7.45 in the morning, and I think there is no doubt that a good many of the discrepancies in the evidence are due to the fact that such a long time has elapsed since the collision took place. My experience in this Court always has been that unless these cases are tried very promptly, the nautical witnesses are apt to forget all about the facts and details, and only remember some of them, the outline of their story. That is not to be wondered at, as they go to sea again and have other business to occupy them.

The collision took place in very foggy weather in the English Channel between the Royal Sovereign Lightship and Dungeness. I think the master of the *Camrose* said it was five miles west of Dungeness and about seventeen miles from the Royal Sovereign Lightship. It occurred between the *Camrose* and the *Duc d'Aumale*, the *Camrose* with her stem and starboard bow striking the *Duc d'Aumale* on her starboard side about amidships, at an angle of somewhere about three points, with resulting damage to both vessels.

The *Camrose* was proceeding up Channel on a voyage from Ibrail to Antwerp, with a cargo of grain, and her course was about E. ½ N. mag. With regard to her speed, the case made for her is that at the time in question she was only proceeding at 2 to 2½ knots, with engines working at dead slow, and was not exceeding a moderate speed in the circumstances. I do not think it necessary to go over in detail the cases presented with regard to the manœuvres. It is sufficient to deal with

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the points that are pressed against the *Camrose*, and I will only refer to the fact that the *Challenge* was towing the *Duc d'Aumale* on a voyage from London to Cherbourg—I believe she was going on afterwards to San Francisco—with a part cargo consisting to a large extent of cement. The course which the tug and tow were on was about W.S.W., and that shews, so far as a comparison between the courses of the *Camrose* and the tug and tow is concerned, a difference of 1½ points, possibly a little more, between the opposite courses.

Now, the points made against each of these vessels have been very fully and very well argued before me. Substantially they make the same points against each other, with one exception. They each say that the other was going at too great a speed, they each say that the other improperly altered her course, and they each say that the other did not stop. The defendants—at least one of them, the owners of the *Challenge*—further say that the *Camrose* ought in addition to stopping to have reversed her engines.

I have very little difficulty in deciding some of the points in this case. With regard to both these vessels—there are three of them, but for the purpose of this case I speak of the two defendants as one—I think both the plaintiffs and the defendants were going at a moderate speed prior to being near to each other, and that point fails as against each side.

With regard to the helm action, which is charged by the plaintiffs as being an improper starboarding on the part of the tug and tow, and with regard to the helm action of the *Camrose*, which is charged by the defendants as being an improper porting, I have come to the conclusion, assisted by the Elder Brethren, that there was no material alteration of the helms on either side which would in any way really influence my decision in this case, and although I may make a few more remarks in dealing with the case in detail, I think the principal points are the question of stopping on the one side and stopping on the other, and also the question of the reversing of the engines which is suggested by counsel for the *Challenge* as against the *Camrose*.

Dealing first with the case against the *Camrose*, I have said

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that I do not think there was any substantial alteration in her course. I think that the angle of the blow practically shews that the vessels did not substantially alter their courses. It is true that it is a little larger than the amount of the divergence between opposite courses, but it is easy to produce that little extra amount either by the reversing of the engines of the *Camrose* or some action of the helm of the *Duc d'Aumale* after the vessels were in sight. There are these further broad considerations, that the effect of the whole of the evidence of the defendants' witnesses generally appears to me to be to shew that the *Camrose* did not substantially alter her course. She appears to have been heading E. by N., according to the master of the *Duc d'Aumale*, when she came in sight, which is practically the same course as she originally was on. The principal point about the alteration of course is made by minute criticisms of the logs, one or two of the entries of which have had additions and alterations made to them. I am not satisfied that they were made at a subsequent time with the intention of making a case. The story told by the master of the *Camrose*, and extracted as far as one can generally from the features of the case and the evidence, appears to me to be that when the whistle of the tug was heard sounding a towing signal, then the engines of the *Camrose* were stopped. There is then some confusion about the orders. There seems to have been an order given to port, but almost immediately after that a second whistle was heard from the tug and the order to port was countermanded and the helm was steadied without, according to the helmsman, any appreciable porting at all. Then the tug was seen, and the engines were reversed and the helm put hard-a-starboard. That seems to have been the order of events, and it seems to me in accordance with the more or less independent evidence of the Belgian pilot. So that the case of improper action of the helm on the part of the *Camrose* to my mind fails. I have already said that her speed was moderate in the weather that existed. There is nothing in the damage to shew the contrary, and, as counsel for the plaintiffs reminded me at the last, I think the surveyor was not able to say that the damage must have been due to any substantial forward motion on the plaintiffs' vessel

as compared with any substantial motion on the other vessel. I do not think he was able to form an opinion. It seems to me, and the Elder Brethren agree, that there was nothing in the damage to shew immoderate speed or any failure to act properly on the part of the *Camrose*.

Now as to the next point, the stopping. I think there cannot be any doubt that the engines were stopped at the time when the first whistle was heard from the tug. That is in accordance with the whole evidence of the case, and I do not think there has been any real contest about that at all. The point made by counsel for the owners of the *Challenge* principally was that the engines ought to have been reversed when the first whistle was heard and the way entirely taken off. The rule does not prescribe that that should be done. She did what is mentioned in the second part of the rule, art. 16, and I have asked the Elder Brethren whether, in the circumstances which the master of the *Camrose* has described, he was called upon to reverse upon hearing the first whistle of the other vessel. Their opinion is that the steamer was not in the circumstances called upon to reverse when the first whistle was heard; that it was enough in the circumstances at first to stop, and then on the second whistle to take further action by reversing if necessary. So it seems to me that the case which was cited, *The Merthyr* (1), is not in point as the facts were different. That deals with the case against the *Camrose*.

Now I come to a question that I have some little difficulty in determining, and my decision is based mainly upon the advice that I have received from the Elder Brethren. In the first place, it appears to have been admitted by counsel for the *Duc d'Aumale* that if the tug is to blame the ship is to blame also. I have already said that I see no reason for imputing any fault to the tug or tow on the ground of speed. They were going at a moderate speed in the circumstances and weather which prevailed.

The next point I have, I think, practically covered, namely, that the tug and tow improperly starboarded their helms. It is difficult to arrive at an exact conclusion as to what was done,

(1) 8 Asp. M. L. C. 475.

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having regard to the conflicting stories told by the master and mate of the tug and the ship's witnesses, but I am not satisfied that the master's account is quite right about this point. I do not think I can find as a fact that there was any improper alteration in the courses of the tug and tow by helm action at any time prior to the collision. What was done when the ships were in sight was done in extremis. I rather prefer to accept the evidence of the mate of the tug than that of the master, who seemed to me to get rather in a fog in giving his evidence.

The real point which I think is important is the question whether the tug ought to have stopped her engines. It is a singular fact in the case that the defence set up by the tug makes no mention of hearing any whistles from the *Camrose* prior to seeing her. The first mention of the *Camrose* is, "In these circumstances those on board of the tug saw the loom of a steamship." When the master of the tug gave his evidence he practically admitted that the whistle of the *Camrose* was heard at the same time as she was seen, and when he came to be cross-examined it seemed clear, both from his fuller evidence and from his mate's evidence, that the whistle of the *Camrose* had been heard at an interval before she was seen, and that when she was seen another whistle was heard about the same time. The master said, "We heard two signals from him, one before we sighted him and one when we sighted him—four minutes between the two." I doubt whether his four minutes is right, but he certainly heard one and then another. The mate said, "I heard one blast before we saw her, some distance off. Nothing was done to the helm or engines then. I heard another blast, and then saw the steamer only 600 feet off." That is quite a different story to that pleaded by the tug, and it is substantially, as I read it, the story told in their pleadings and by the *Duc d'Aumale's* witnesses. In the defence it is stated that, "In these circumstances the whistle of a steamship was heard by those on board the *Duc d'Aumale* on the starboard bow. The *Duc d'Aumale* was kept on her course, and the whistle of the tug continued to be sounded, one long and two short blasts, at proper intervals. Soon afterwards the whistle was again heard, and after a short interval a steamship, which proved to

be the *Camrose*, came in sight, two to three points on the starboard bow of the *Duc d'Aumale*, and about a quarter of a mile distant." The distance is probably an over-estimate, but is substantially what the master of the *Duc d'Aumale* said. So there seems no doubt that the steamer's whistle was heard, and then there was an interval, and then it was heard again and the vessel was seen.

That gives rise to the point whether the tug ought to have stopped her engines in the position which her master and mate described. When their evidence is considered, and when the evidence from the ship is considered, the point made by the defendants is that the tug and tow ought not to have, in the circumstances, stopped at all, but ought to have kept on, as avowedly they did. That they kept on at the speed at which they were going, whether it was two or three knots—possibly it was only two—there is no doubt whatever, practically until the collision took place. The tow-rope was taut all the time, and therefore the ship was making the same progress as the tug was making. The defendants say that in these circumstances they had no reason to stop.

The plaintiffs' contention is that the tug ought to have stopped and let the way run off the ship, so that danger of collision or danger of any serious blow might be averted. Let us first look at the positions of the vessels. The *Camrose* was heading up Channel, approaching Dungeness on an up-Channel course. The tug and tow were heading down Channel, but heading W.S.W., making for Cherbourg, and, therefore, they were crossing, or rather departing to the southward from the usual Channel course there, and it seems to me that the moment the whistle was heard on the starboard bow the position probably was—almost a certainty—that that steamer was on a crossing course to theirs, and, the whistle being heard somewhat fine on the starboard bow, every movement forward brought those vessels into closer proximity. Therefore the situation was such that the greatest precaution should be taken to avoid danger and to minimise it in every way possible. That seems to me absolutely clear, and, when I have listened to the evidence given by the master of the tug and the mate, I

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cannot see that they have suggested that there was any difficulty whatever in the tug stopping so as to allow the way to run off the ship.

I have asked the Elder Brethren their advice on this, which is a nautical question, and I have had some difficulty about it, in consequence of what I have been referred to in the case of *The Lord Bangor*. (1) That is why I have pointed out in this case that the circumstances were such that, if it could possibly be done, such action should be taken to avert or minimise the effect of collision. The Elder Brethren advise me that, in this case, the tug could have stopped without encountering any difficulty with regard to her tow, sufficiently to let the way run off the tow—that the circumstances which I have described admitted of this being done, and in the position of the vessels it would have been proper seamanship to do so. That seems to me to make an end of the matter, because if the ship's way had been taken off by the tug stopping it is quite obvious that the collision would not have taken place. I do not think that that leaves anything more to consider in connection with the navigation of the vessels. The result is that I find there was no blame on the part of the *Camrose*, but, on the other hand, that the *Challenge* and the *Duc d'Aumale* must be held to blame.

Tug and tow to blame.

The further issue raised, namely, whether the questions in dispute between the parties had not been previously determined by another competent Court, so that the matter was res judicata, was then proceeded with.

According to the admissions of fact and the pleadings it appeared that, after the collision, the *Camrose*, which is a British steamship, proceeded to Antwerp, where, on June 25, 1902, proceedings were instituted for her arrest by the Compagnie Maritime Française—who are French subjects resident in France and owners of the *Duc d'Aumale* (2)—to abide the result of proceedings in France.

To prevent the arrest of the *Camrose*, the Belgian agents of

(1) [1896] P. 28. (2) See *The Duc d'Aumale*, [1903] P. 18.

her owners at Antwerp, on July 1, gave bail for 250,000 francs, and, on July 8, the owners of the *Duc d'Aumale* commenced an action against the owners of the *Camrose* in respect of the collision in a Court of competent jurisdiction, the Tribunal of Commerce at Nantes. To this action the owners of the *Camrose* did not appear though duly notified. On August 20 the Tribunal of Commerce at Nantes pronounced judgment by default against the owners of the *Camrose*, and condemned them to pay to the owners of the *Duc d'Aumale* the amount of loss and damage sustained by the latter by reason of the collision.

The pleadings further alleged that by the law of Belgium, and by virtue of a treaty, dated July 8, 1899, and made between France and Belgium, the decisions of the Courts in civil or commercial matters in either of the two States can be enforced in the other. On March 20, 1903, the first chamber of the Civil Tribunal at Antwerp held that the conditions necessary to give a decision of a French Court executory force in Belgium had been complied with, and—after holding that the first chamber had no jurisdiction over the agents of the owners of the *Camrose* who had given bail to obtain the release of the vessel—they condemned the owners of the *Camrose*, who had appeared in the proceedings at Antwerp, to pay to the French company the amount of the damage sustained by the company together with the costs of the executory proceedings. Due notice of the judgments of the Commercial Tribunal at Nantes, and of the Civil Tribunal at Antwerp, were given to the owners of the *Camrose*, and it was alleged that these judgments were valid and conclusive on the owners of the *Camrose*, and by reason thereof the owners of the *Camrose* were not entitled to maintain the present suit against the Compagnie Maritime Française.

By their amended reply the owners of the *Camrose* in substance alleged that they did not reside or carry on business in the Republic of France, and did not owe any allegiance to the French Republic; that the *Camrose* was not at any material time within the jurisdiction of the French Courts, and that if the Tribunal of Commerce at Nantes had any jurisdiction it was by reason only of the nationality of the Compagnie

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Maritime Française; that they, the owners of the *Camrose*, were compelled to put in bail through their agents at Antwerp to prevent the arrest of the vessel there, and that no judgment had at that time been obtained at Nantes; that the effect of the alleged treaty between France and Belgium was not admitted, and that no judgment on the merits had been obtained in either France or Belgium.

Copies of the judgments, authenticated in accordance with the provisions of 14 & 15 Vict. c. 99, s. 7, were put in.

Carver, K.C., and *Noad*, for the defendants, the Compagnie Maritime Française, the owners of the *Duc d'Aumale*. So far as was necessary in proceedings by default of appearance, the French Court took into consideration the merits of the case, and the owners of the *Camrose* had ample opportunity to appear and contest the suit. They did appear at Antwerp, and thereby they made themselves parties to the suit. The time has now elapsed within which they could have disputed the validity of the proceedings at Nantes, and, by virtue of the treaty between France and Belgium, the Compagnie Maritime Française is in a position to enforce their claim for the damage found by the French Court to have been sustained by the *Duc d'Aumale*. The result is that the plaintiffs in the present action are estopped from proceeding in this country.

Laing, K.C., and *Balloch*, for the plaintiffs, the owners of the *Camrose*. The proceedings taken at Antwerp by the defendants, the owners of the *Duc d'Aumale*, were by way of "executory seizure" in anticipation of any judgment which might be afterwards obtained from a Belgian tribunal giving executory effect to a judgment of a French tribunal, and bail was only put in at Antwerp by the agents of the owners of the *Camrose* to prevent the arrest of the vessel there. The subsequent appearance of the owners of the *Camrose* in the Civil Tribunal at Antwerp was to prevent the judgment of the French Court being declared executory by default of appearance, and the decree of the Civil Tribunal at Antwerp giving executory effect in Belgium to the judgment of the Tribunal of Commerce at Nantes is the subject of an appeal by the owners

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of the *Camrose*, and is now pending before the Supreme Court at Brussels. The ground of the appeal is that the treaty between the two countries does not apply to the case of a foreigner, but only to litigants who are citizens of the two countries. No final judgment has been pronounced by a competent foreign Court, in the presence of the parties, on the merits. This Court will, therefore, reject the plea of res judicata, and declare that the present action in this country, in which a decision has been given on the merits in the presence of the parties, is not barred: *The Delta*. (1)

GORELL BARNES J. The point taken by the defendants, the Compagnie Maritime Française, in their amended defence, is that there has been a decision between the plaintiffs and the owners of the *Duc d'Aumale* which binds the plaintiffs, the owners of the *Camrose*, so that they cannot proceed with the present case. On the other hand, the plaintiffs contend that the questions at issue on the merits have never been determined between the plaintiffs and the defendants. They certainly never have been determined between the plaintiffs and the tug-owners.

The matter has been treated in a very summary way before me, and the only documents which have been put in are some admissions, a copy of a judgment obtained at Nantes by the owners of the *Duc d'Aumale*, and copies of some pleadings and of a judgment at Antwerp; but, as I understand, what has taken place is this: The owners of the *Duc d'Aumale* arrested the *Camrose* at Antwerp in order, if possible, to levy upon that ship, or the bail given for it, the amount of a judgment which they might afterwards obtain in Nantes. Proceedings were instituted by them at Nantes subsequent, as I understand, to the time when the ship was arrested at Antwerp, and those proceedings were entered in the Commercial Tribunal at Nantes for the purpose of obtaining a decision that the *Camrose* was to blame for the collision, and liable for the damages which the owners of the *Duc d'Aumale* sought to recover from the owners of the *Camrose*. The owners of the

(1) 1 P. D. 393.

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Camrose did not appear in that suit, as is recorded in the admission that has been made. They were not at the commencement of the suit, nor at any time subsequently, within the territory of the Republic of France, and not subject to the jurisdiction of the Court at Nantes, and they never appeared in that suit. The suit was proceeded with, and treated as a suit by default, and a judgment was obtained in the tribunal at Nantes, which, in effect, appears to me to hold the owners of the *Camrose* responsible for damages sustained by the owners of the *Duc d'Aumale*. Then, having obtained that judgment, the owners of the *Duc d'Aumale* took steps to enforce that judgment in the proceedings in which they had arrested the *Camrose* at Antwerp. As I understand from the copy of the judgment before me, the Civil Tribunal at Antwerp held that an exequatur of the judgment given by the tribunal at Nantes should be granted, but that they have no jurisdiction as regards the Belgian agents of the owners of the *Camrose* who gave bail to prevent the arrest of the vessel.

The point, therefore, taken by the defendants, the owners of the *Duc d'Aumale*, in the case before me is, that, by appearing in Belgium to stop their ship being arrested, the plaintiffs, the owners of the *Camrose*, have in some way assented to the jurisdiction of the French tribunal at Nantes. I confess I am unable to follow that point. It seems to me that the owners of the *Camrose* were in no way bound to submit to the jurisdiction of the Court in France. They did not appear and were not there, and I have read the admission stating that they were not, and the further point as to their non-allegiance. It is said that they were bound to appear at Nantes, because their ship was arrested in Belgium to enforce a judgment not yet obtained at Nantes. It may be that, by not appearing at Nantes, they have left themselves in the position of having this judgment enforced in some way against them in Belgium; but I am not informed how that is going to be done, and I understand that the owners of the *Camrose* are appealing against the decision of the tribunal at Antwerp. There is no evidence before me of any jurisdiction over the bail, or to try the merits. There is

no doubt that, as in the case of *The Delta* (1), the question of the merits has never been tried anywhere; and that being so, the whole point resolves itself into this—that, because the owners of the *Camrose* have appeared, when no suit had been instituted in France, to stop the arrest of their ship in Belgium, they have submitted to the jurisdiction of the tribunal in France. I fail to understand how that is substantiated. It seems to me that that is no bar to the judgment I have pronounced, holding the two sets of defendants to blame.

Plea of res judicata rejected.

Solicitors for plaintiffs, the owners of the *Camrose*: *Thomas Cooper & Co.*

Solicitors for defendants, the owners of the *Challenge*: *Williamson, Hill & Co., for R. & R. F. Kidd, North Shields.*

Solicitors for defendants, the owners of the *Duc d'Aumale*: *William A. Crump & Son.*

(1) 1 P. D. 393.

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THE DUC D'AUMALE (No. 2).

Admiralty—Salvage—Contract of Towage—Tug and Tow to blame for Collision with Third Vessel—Negligence of Tug that of her Master—Services rendered by Tug to Tow—Claim of Crew of Tug—Public Policy.

A sailing vessel, whilst in tow of a steam-tug, under a contract of towage, came into collision with a third vessel, and the tug and tow were found to blame, the negligence of the tug being that of her master. After the collision the tug towed the sailing vessel in her damaged condition to the nearest port of safety, and the owners, master, and crew of the tug claimed salvage:—

Held, by Gorell Barnes J., that the tow having been placed in a difficulty by the joint negligence of tug and tow, the tug could not claim salvage for services afterwards rendered in extricating the tow from that difficulty, for the claim of the owners of the tug was barred by reason of the negligence of their agent, the master, having in part caused the mischief from the consequences of which the tow was rescued; the claim of the master was barred by reason of his being the party actually guilty of the negligence in part causing the mischief, and the claim of the crew was also barred in Admiralty on the ground of public policy, which rendered it undesirable to encourage a crew to hope to recover salvage in respect of services to be rendered to a vessel damaged through the contributory negligence of their master.

The Cargo ex Capella, (1867) L. R. 1 A. & E. 356, followed.

ACTION OF SALVAGE.

The plaintiffs were the Elliott Steam Tug Company, Limited, the owners of the *Challenge*, and her master and crew. The defendants were the owners of the *Duc d'Aumale*, her cargo and freight.

For the purposes of the argument of the point of law, whether the owners, master, and crew of the *Challenge*, or any of them, were entitled to salvage reward, the facts set out in the statement of claim (subject to the corrections noted below) were admitted by the defendants, and, so far as material, were as follows:—

"Par. 2. The *Challenge* is an iron screw-tug of 137 tons gross register. She is fitted with engines of 95 horse-power nominal and 650 horse-power indicated. She carries a crew of nine hands and is of the value of 6500*l*.

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"Par. 3. About 2 P.M. on June 21, 1902, the *Challenge* left Millwall Docks with the *Duc d'Aumale* in tow bound for Cherbourg. About 8 A.M. on the 22nd the vessels were off Dungeness; there was a dense fog with the wind from the westward. The *Challenge* was proceeding at slow speed when the steamship *Camrose* negligently (1) ran into the *Duc d'Aumale*, striking her a severe blow on the starboard side in the way of the main hatch, cutting her down to and below the water-line and causing her to leak badly. The *Challenge* at once rounded and came alongside the starboard side of the *Duc d'Aumale*. Efforts were made to stop the leak, but without success, and all the steam and hand bilge and fore pumps were set to work to reduce the water which was rapidly rising in the *Duc d'Aumale*, and the *Challenge* was directed to make for Dunkirk as quickly as possible.

"Par. 4. The weather still continued very thick, but the *Challenge* towed the *Duc d'Aumale* round and proceeded on a course for Dunkirk; but when off Romney in the East Bay of Dungeness the master of the *Challenge* was hailed to proceed as quickly as possible towards the land, but was afterwards ordered to proceed as quickly as possible to Calais. The dense fog still continued, and the tug could only proceed at reduced speed to Calais, off which port the vessels arrived at 4 o'clock that afternoon. Pilots were taken on both the *Challenge* and the *Duc d'Aumale*, but they at first refused to take her in owing to the state of the tide; but as the vessel was sinking (2) and already had thirteen feet (3) of water in her hold they agreed to do so, and under their direction the *Challenge* towed the *Duc d'Aumale* in. She would not steer properly and struck a tug and the quay wall, but was towed successfully by the *Challenge* and put on the mud in a place of safety.

"Par. 5. The *Challenge* remained in attendance on the

(1) By the judgment in the action, *The Challenge and Duc d'Aumale* (ante, p. 41), the collision between the *Camrose* and the *Duc d'Aumale* was pronounced to be due to the negligence of the *Challenge* and the *Duc d'Aumale*. This judgment was taken as put in.

(2) The probability of the vessel sinking was to be judged of by the Court on the evidence of the master of the *Duc d'Aumale* and the documents.

(3) Six feet substituted by consent.

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Duc d'Aumale until the 23rd, when with the assistance of another tug she was towed by the *Challenge* into dry dock.

"Par. 6. By the services of the plaintiffs, which were rendered with skill and promptitude with some risk in very thick weather, the *Duc d'Aumale*, her cargo and freight were saved from total loss and taken to a place of safety.

"Par. 7. The *Duc d'Aumale* is a steel barque of 1732 tons net and 2297 tons gross register. She was laden with a cargo of 1600 tons of cement and manned by a crew of seventeen hands."

The agreed value of the *Duc d'Aumale*, her cargo and freight at risk, was 14,000*l.*

Paragraph 4 of the defence was as follows:—

"In the event of its being held in an action now pending in this honourable Court, in which the Marychurch Steamship Company, Limited, are plaintiffs, and the Elliott Steam Tug Company, Limited, and the Compagnie Maritime Française are defendants, that those on board the *Challenge* were guilty of negligence contributing to the collision between the *Duc d'Aumale* and the steamship *Camrose*, the defendants will contend that the plaintiffs are not entitled to salvage reward."

It was admitted by the plaintiffs for the purposes of the argument that the negligence of the tug was that of her master.

The contract of towage, dated May 16, 1902, between the Elliott Steam Tug Company, owners of the *Challenge*, and the Compagnie Maritime Française, owners of the *Duc d'Aumale*, was (omitting formal parts) as follows:—

"We beg to confirm arrangement for towage of ship *Duc d'Aumale* of 1732 tons register by one tug from: London to Cherbourg, waiting there 24 hours, thence out to Casquets, 75*l.*; Start Point, 90*l.*; Lizard, 105*l.*

"Should the tug be detained at Cherbourg more than 24 hours, then the charge to be 5*l.* for every 12 hours or part thereof.

"Tug to give loan of hawser. 'No cure, no pay.'

"The owners do not hold themselves responsible for any damage occurring or occasioned by vessels while in tow of a steam-tug.

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"See conditions on other side.

"Notice is hereby given that vessels and craft will be towed on the following conditions only:—

"That the owners of the steam-tugs are not to be answerable or accountable for any loss or damage whatsoever, by collision or otherwise, which may happen to, or be occasioned by, any vessel, or craft, or any of the cargoes on board of the same, while such vessel is in tow, whether arising from or occasioned by any accident, or by any omission, breach of duty, mismanagement, negligence, or default of them or their servants, or defect or imperfection in the steam-tugs or any of them, or the machinery or ropes, or any other part of them, or any delay, stoppage, or slackness of speed of the same, however occasioned or for what purpose, wheresoever taking place; and that the owners or persons interested in the vessel or craft so towing, or of the cargo on board the same, shall, and do, undertake, bear, satisfy, and indemnify the tugowners against all liability for the above-mentioned matters; and especially that to all intents and purposes whatsoever the master and crew of the tug or tugs, so towing, shall be deemed and considered to be the servants of the owners, master, and crew of the vessel or craft towed, the tugowners being in no way liable for any of their acts, or for any of the consequences of the causes above excepted. The acceptance, hiring, or employing of a steam-tug is not to prejudice any claim the steam-tug owners may have to salvage remuneration for any extra services that may be rendered to the ship or cargo from or arising out of circumstances not existing or contemplated at the time of such acceptance, hiring, or employment; nor shall it prejudice any claim the steam-tug owners may have for detention of the steam-tug . . . ."

Oct. 28. *Aspinall, K.C.*, and *A. E. Nelson*, for the plaintiffs, the owners, master, and crew of the tug *Challenge*. The defendants, the owners of the *Duc d'Aumale*, throughout the hearing of the case of the collision with the *Camrose* never alleged that the tug was to blame, so that they cannot now be heard to say in this salvage suit that the tug was negligent

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towards them. The point, therefore, taken by them that—by reason of the judgment that the tug and tow were in default in the case of the action of damage by collision brought by the *Camrose* against the *Challenge* and the *Duc d'Aumale*—the present salvage action cannot be maintained, is not open to them. It is also submitted that the judgment cannot be set up against the owners of the tug, for, by the terms of the contract of towage, the owners of the tug are expressly relieved from any responsibility for loss or damage by collision occasioned by any default of them or their servants, and the owners of the vessel towed are to indemnify the tugowners against any such liability. It is further stipulated that the master and crew of the tug, whilst towing, are to be deemed to all intents and purposes the servants of the owners of the vessel towed, and the hiring of the tug is not to prejudice any claim for salvage for extra services rendered to the vessel towed or to her cargo. These provisions enable the owners of the tug to sue for salvage in respect of services outside the scope of the towage contract, and bring the case within the principle held to apply with reference to general average contribution, as in *Milburn* v. *Jamaica Fruit Co.* (1), where the contract for the carriage of the goods contained an exception of negligence of the master and crew, and the shipowner was held entitled to a contribution from the owner of the goods to general average expenses, though the necessity for the same had been occasioned by the negligence of the master. In that case, in the dissenting judgment given by Vaughan Williams L.J., the following passage occurs (2): "In my judgment the only way in which a shipowner can be placed in a position to recover general average contribution in a case where the peril has arisen from the negligence of the master and crew is a case where the master and crew have ceased, by the terms of the charterparty or otherwise, to be the servants or agents of the shipowner." The result is that, though, as against the *Camrose*, the tugowner by reason of the judgment in the last case has been found to be a wrong-doer, he is not a wrong-doer as against the tow, because the

(1) [1900] 2 Q. B. 540. (2) [1900] 2 Q. B. at p. 551.

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contract exonerates the tugowner, and enables him to recover by way of salvage what he might not otherwise be able to claim. Again, the necessity for the performance of salvage services brought the contract in respect of towage, for the time being, to an end; and, though the tug was bound to stand by, her owners, master, and crew became entitled to salvage remuneration for such services as were rendered necessary by the damaged condition of the tow.

If, however, the Court should hold that the owners of the tug are not in a position to make a claim for salvage owing to their responsibility for the acts of their agent, the master, and that the master himself cannot make any claim as being the party actually negligent, still the crew, apart from the owners and master, are entitled to claim as they are innocent persons. It must be admitted that the case of *The Cargo ex Capella* (1) is against this view; but that case was decided before the doctrine of identification, as laid down in *Thorogood* v. *Bryan* (2), was treated as a mere figure of speech and exploded in *The Bernina*. (3) On this point Kennedy J. in his work on salvage (4), whilst admitting that there is no reported case drawing any distinction, and that "the Court looks, so to speak, at the conduct of the ship only, and identifies with the ship all those who are connected with it," remarks that "it might seem . . . . to be more exactly just, where the negligence or misconduct which has occasioned the collision is the negligence or misconduct of some only of its members, to discriminate between those who are and those who are not to blame, instead of refusing salvage to all alike."

This erroneous notion of a delinquent ship, and consequent disqualification of the crew by reason of their identification with the ship, runs through all the cases, as in *The Glengaber* (5), where a tug had been found to blame for a collision, and in a salvage suit brought by her owners, master, and crew Sir Robert Phillimore said: "I am of opinion that she cannot recover in this Court salvage reward for services which were

(1) L. R. 1 A. & E. 356.
(2) (1849) 8 C. B. 115.
(3) (1888) 13 App. Cas. 1.
(4) The Law of Civil Salvage, 1891, p. 74.
(5) (1872) L. R. 3 A. & E. 534, at p. 535.

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rendered necessary by her own misconduct"; but the severance of the rights of the owner and of the crew has been recognised in such cases as *The Sappho* (1), where the crew of the salving ship were held entitled to salvage against the salved vessel, although the owner of the salving ship was not so entitled by reason of his being also the owner of the salved vessel. So in *The Glenfruin* (2), the master and crew were held entitled to salvage as against cargo, though, with the exception of one independent owner, the owners of the salving ship, who were also owners of the salved vessel, were barred on the ground that the salved vessel was unseaworthy at the beginning of the voyage. So in *The August Korff* (3), the master and crew of a salving ship belonging to the same owners as the salved vessel were held entitled to a salvage award against the salved vessel, her cargo and freight, though the owners of the salving ship were only entitled to salvage as against that part of the cargo of the salved vessel which did not belong to them.

[GORELL BARNES J. If the crew became, by the terms of the contract of towage, the servants of the tow, they only did what they were bound to do as such servants.]

No, they did a great deal more, for the towage of the vessel into Calais was a difficult and dangerous operation.

[They also referred to *The Ripon City* (4); *The Romance* (5); *The Devonian* (6); *Five Steel Barges* (7); *The President Ludwig*. (8)]

Carver, K.C., and *Lewis Noad*, for the defendants, the owners of the *Duc d'Aumale*, her cargo and freight. On the finding of the Court in the case of the *Camrose* against the tug and her tow that the collision between the *Camrose* and the *Duc d'Aumale* was caused by the joint negligence of the tug and tow, the claim for salvage against the *Duc d'Aumale*, her cargo and freight, is barred.

In a passage in the judgment of the Privy Council in *The*

(1) (1871) L. R. 3 P. C. 690.
(2) (1885) 10 P. D. 103.
(3) [1903] P. 166.
(4) [1897] P. 226.
(5) [1901] P. 15.
(6) [1901] P. 221.
(7) (1890) 15 P. D. 142.
(8) *Ship. Gaz.*, May 16, 1901.

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Minnehaha (1), Lord Kingsdown deals with the case of a tug under a towage contract occasioning or materially contributing to the danger in which the tow is placed, and concludes with the observation that the tug "never can be permitted to profit by her own wrong or default."

This passage has been quoted again and again, and is referred to by Baggallay L.J. in *The Robert Dixon* (2), where it was held that a tug under contract to tow a ship is not entitled to salvage remuneration for rescuing the ship from danger brought about by the tug's negligent performance of her towage contract, and in that case, in addition to the finding that the "towage service was never changed into salvage," the owners of the tug were made liable for the loss of the anchors and chains slipped by the tow.

In this case the tug was not relieved from her contract to tow, for it was the duty of those in charge of the tug to cope with the danger which they had themselves created—that is to say, the negligent act of their master will not enable the tug-owners to get rid of their contract as they are responsible for the acts of their agent, and it is immaterial that there was joint negligence owing to the master of the *Duc d'Aumale* not insisting on the tug stopping and so averting collision with the *Camrose*.

That the master cannot claim is clear, he being the negligent person on board the tug, and there is no precedent for severing the services of the crew from the tug to which the crew belongs. In *The Cargo ex Capella* (3) the claim for salvage was made by the master and crew of one of two vessels both of which had been found to blame for a collision; but it was held that they were not entitled to reward for saving property which they had by their own wrongful acts contributed to place in jeopardy, Dr. Lushington in his judgment stating the governing principle to be "that no man can profit by his own wrong." In *The Altair* (4) the claim for salvage was by the owners, master, and crew of a steam-tug; but the claims of all of them were dis-

(1) (1861) 15 Moo. P. C. 133, at p. 155.
(2) (1879) 5 P. D. 54.
(3) L. R. 1 A. & E. 356, at p. 357.
(4) [1897] P. 105.

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missed on the ground that the stranding of the tow had been partly due to the negligence of the tug.

The position is summed up by Kennedy J. in his work on salvage (1) thus: "If . . . . in the performance of the towage services the tow gets into a position of danger, to extricate her from which would entitle a stranger to salvage reward, the tug is not entitled to any reward if the situation in which the tow was placed resulted wholly or to a material extent from . . . . negligence . . . . on the part of the tug."

No doubt in *The Bernina* (2), overruling *Thorogood* v. *Bryan* (3), it was held that a person injured, but not himself in fault, on board the ship to blame for the collision, can recover from the owner of the other wrong-doing vessel; but the considerations which govern cases of that description are not the same as those relating to the conversion of towage into salvage, for the members of the crew are not absolved from their duty to carry out the contract of towage unless they can shew that circumstances arose which were not due to them—that is to say, that as they are working on the tug in accordance with the contract between the owners of the tug and tow, it lies on them to prove that the services were different from those which they had undertaken, and that their position had been altered by something outside the tug which did not arise from the negligence of those in charge of the tug. On the evidence the crew did nothing more than their ordinary duties, and incurred no extra risk.

The cases, of which *The Sappho* (4), commenting on *The Maria Jane* (5), is an illustration, are distinguishable, as they depend on the principle that the relation of master and servant only exists between the crew and their employer with reference to their own ship, and therefore salvage services rendered to another ship, of which their employer is also owner, are outside their contract.

The contract of towage did not come to an end, nor was it superseded or suspended, for the tug could not have abandoned

(1) The Law of Civil Salvage, 1891, p. 94.
(2) 13 App. Cas. 1.
(3) 8 C. B. 115.
(4) L. R. 3 P. C. 690.
(5) (1850) 14 Jur. 857.

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the tow, and the work done by the crew was work which they were bound to perform under the contract of towage. The stringent provisions annexed to the contract in respect of the indemnity to be given by the owners of the tow to the owners of the tug are only for the purpose of emphasizing the condition that all the risks referred to are to be borne by the tow. If the crew were by the contract constituted the servants of the tow, they could not claim salvage from the tow, and the passage quoted from the dissenting judgment of Vaughan Williams L.J. in *Milburn* v. *Jamaica Fruit Co.* (1) has nothing to do with that position, as it only has reference to the case of a shipowner being lessor and the charterer lessee with the master and crew as his servants.

The propriety of awarding salvage rests with the Court in accordance with the principles of maritime law and not on contractual relations between the parties. One condition imposed by the Court under the policy indicated by maritime law is that the person claiming salvage must not have occasioned the mischief.

[They referred to *Grill* v. *General Iron Screw Colliery Co.* (2)]

Aspinall, K.C., in reply. The passage referred to from the judgment in *The Minnehaha* (3) deals with the case of a tug, under a towage contract, occasioning the danger to which the tow is exposed, but does not deal with the position of both tug and tow being negligent, nor with the respective claims of the owners, master, and crew of the tug in such a case. In *The Altair* (4) the question as to the rights of the crew, apart from the owners, was not raised.

Nov. 2. GORELL BARNES J. I have already decided that those in charge of the sailing ship *Duc d'Aumale* and of her tug the *Challenge* were to blame for a collision with a third vessel off Dungeness, and the question now before me is whether the owners, master, and crew of the tug *Challenge*, who are the plaintiffs in the present action, are entitled to

(1) [1900] 2 Q. B. 540, at p. 551.
(2) (1868) L. R. 3 C. P. 476.
(3) 15 Moo. P. C. 133, at p. 155.
(4) [1897] P. 105.

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salvage against the defendants, the owners of the *Duc d'Aumale*, her cargo and freight, for services rendered by the tug after the collision in towing the vessel in her damaged condition to Calais as the nearest port of safety.

It is contended on behalf of the defendants that none of the plaintiffs can recover salvage remuneration because the collision—including what happened afterwards as a consequence of it—was due in part to the negligence of those on board the tug.

On behalf of the plaintiffs it is urged that, in the circumstances, they are all entitled to salvage; or assuming that the owners of the tug cannot recover by reason of their agent, the master, having been—as admitted for the purposes of the argument—the negligent person on board the tug, and that the master cannot recover as being the actual delinquent, at any rate the crew are entitled to salvage.

There is one matter to which I must refer before dealing with the general question. Counsel for the plaintiffs rely on the towage contract which was entered into between the owners of the *Duc d'Aumale* and the Elliott Steam Tug Company, under which the *Duc d'Aumale* was to be towed from London to Cherbourg. There are conditions on the back of it which they say affect the present case. Those conditions are very long. I have read them carefully, and I take the view presented by counsel for the defendants in connection with the exceptions referred to—that they really are exceptions which excuse the owners from liability, but do not affect this present question of salvage services.

The first point appears to me to depend upon the principles which have guided this Court in arriving at its decisions on the subject of salvage services, and on the position adopted by the Court in dealing with the case of tug and tow, where what has happened has been due to the negligence both of the tug and tow. The general question has been discussed in several cases, amongst others in *The Minnehaha* (1), in which is to be found the well-known judgment set out in so many subsequent cases, and in the text-books. There is one

(1) 15 Moo. P. C. 133.

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passage in it which is of importance, namely: "If the danger from which the ship has been rescued is attributable to the fault of the tug; if the tug, whether by wilful misconduct, or by negligence, or by the want of that reasonable skill or those equipments which are implied in the towage contract, has occasioned or materially contributed to the danger, we can have no hesitation in stating our opinion that she can have no claim to salvage."

It has been contended that such observations do not apply where both tug and tow are negligent; but in my judgment that cannot be said of such a case as *The Altair* (1), decided by myself. There a tug was held responsible for the direction of the course, and, having been found negligent in respect of it and in not taking soundings, her claim for salvage was dismissed. There was in that case a counter-claim by the defendants, the owners of the salved vessel. It was also dismissed, because their master was held guilty of contributory negligence in allowing the tug to run on instead of ordering her to haul off when approaching a difficult port in foggy weather—that is to say, there was negligence of both tug and tow, and both claim and counter-claim were dismissed. In *The Robert Dixon* (2) I do not think there was any point of negligence on the part of both tug and tow; but one part of the judgment of the late Lord Esher, then Brett L.J., is very important. He says: "The plaintiffs, being under a towage contract, bring this action, in which they assert that the towage service was altered into salvage; and it seems to me that the plaintiffs are in this position, that it lies on them to shew that the change occurred without any want of skill on their part, but by mere accident over which they had no control. The burden of proof on both the affirmative and the negative issues is on the plaintiffs, that is both that there was an inevitable accident beyond their control and that they shewed no want of skill."

It appears to me, apart from the question of individuals, with which I will deal in a moment, that where there is an occurrence—I will not use the word accident—which requires

(1) [1897] P. 105. (2) 5 P. D. 54.

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services of a salvage nature, and that occurrence has originated in the negligence of both tug and tow, the tug cannot claim any salvage for services afterwards rendered in extricating the ship from the difficulty in which she has been placed by that joint negligence.

The next point which has been taken is that, at any rate, those persons on the tug who were not negligent, and even her owners, because they were not negligent personally, can recover for salvage services. Counsel for the plaintiffs argued in favour of the crew, other than the master, on this point, and for the owners. As far as the owners are concerned, it seems to me that this point depends partly upon the contract to which they have referred, and which to my mind does not affect the question of salvage at all; and that they really stand or fall by the negligence of their master, and cannot recover, for the reasons I have already given. I do not think it true in this case to say, as counsel contended, that the tug was under no obligation whatever afterwards to do anything for the tow. It seems to me that that would not be carrying out the principles laid down in *The Minnehaha*. (1) I cannot regard the tug, in a case of this kind, as released from all duty towards the tow. It seems to me that after the accident happened she was not relieved from all obligation towards the ship, but that, if salvage services were performed in getting the ship out of difficulty, they would be, to use the language of the Privy Council in *The Minnehaha* (1), "services of a different class and bearing a higher rate of payment," and it would be "held to be implied in the contract that the tug should be paid at such higher rate"; but in this case there would be no payment, because, as I have already said, there was negligence on the part of the master of the tug contributing to the situation from which the ship had to be relieved. So I cannot accept the view contended for by counsel for the plaintiffs that the tug was under no obligation whatever to the tow. It seems to me to follow that, for the reasons I have given, the tugowner and the master cannot recover in this case, because of the negligence of the master.

(1) 15 Moo. P. C. 133.

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I proceed now to deal with the further contention that, at any rate, the crew can recover—that is, those who were not responsible for the disaster. As far as I know, this is the first time that, in a case of tug and tow, an attempt has been made to separate the crew from the master of the tug—that is, from the person actually negligent. The cases which have been cited on behalf of the plaintiffs, such as *The Bernina* (1) and *Milburn* v. *Jamaica Fruit Co.* (2), have not, to my mind, any practical bearing on this question. Similar remarks apply to *The Sappho* (3), where services were performed to ships belonging to the same owner, and the master and crew were held entitled to salvage. There is also the case of *The Glengaber* (4), where by the improper navigation of a steam-tug a vessel at anchor was sent adrift and placed in jeopardy. Another steam-tug rendered assistance to the drifting vessel, and it was held that the owners of that steam-tug were entitled to an award, although some of them were also owners of the vessel which occasioned the mischief. Sir R. Phillimore, in giving judgment in favour of the owners, master, and crew in that case, said that he knew of "no authority for the proposition that a vessel wholly unconnected with the act of mischief is disentitled to salvage reward simply because she belongs to the same owners as the vessel that has done the mischief." That case differs from the view taken by Butt J. in *The Glenfruin* (5), where it was held that the master and crew and one owner of the salving ship were entitled to salvage against the cargo of the salved vessel, though the other owners of the salving ship, who were also owners of the salved vessel, were disentitled by reason of a breach of the implied warranty that the salved vessel was seaworthy at the beginning of the voyage.

I can understand that where the vessel which renders salvage services is entirely unconnected with the ship that is salved, those persons, like the master and crew or owners, who are not owners of the ship that is salved, or under no contractual liability to persons on board that ship, can recover

(1) 13 App. Cas. 1.
(2) [1900] 2 Q. B. 540.
(3) L. R. 3 P. C. 690.
(4) L. R. 3 A. & E. 534.
(5) 10 P. D. 103.

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salvage; but I do not think that applies to the case of a tug and her tow.

I think in coming to a conclusion on the questions before me, it is necessary to consider carefully the principles upon which the Court proceeds in awarding salvage. It appears to me that the Court is guided by due regard to the benefit conferred, combined with due regard to the general interests of ships and commerce: by which I mean that the policy of what is to be done comes into consideration as well as the mere benefit received. It seems to me that both on principle and as a matter of good policy that it would not be desirable to encourage a crew to recover a salvage reward in such cases of tug and tow where the master of the tug has been one of the causes of the disaster from which the ship to which salvage service has been rendered is rescued. I am fortified in this view by the case of *The Cargo ex Capella* (1), where Dr. Lushington said: "In my mind the principle is this, that no man can profit by his own wrong. . . . The rule would bar any claim (by the wrong-doers) for services rendered to the other ship which was a co-delinquent in the collision." That was a claim by the master and crew of one of the colliding vessels. In the case of *The Glenfruin* (2), to which I have referred, the people on the salving vessel had nothing whatever to do with the accident that happened to the salved vessel. In the case of *The Glengaber* (3), the steam-tug which came up and rendered assistance had nothing to do with the accident which originally brought about the difficulty; and it is a remarkable fact that no case has been cited to me in which any similar suggestion has been made of the crew in a towage case recovering salvage where the master and owners could not. The point must have arisen. It was capable of being made in *The Cargo ex Capella*. (1) It was capable of being made in *The Altair* (4) and in other cases; but it has never been suggested, and it seems to me that it may be that the right view to take is this, that the tugowners are not relieved entirely from their contract by what has happened, and when they proceed to render

(1) L. R. 1 A. & E. 356.
(2) 10 P. D. 103.
(3) L. R. 3 A. & E. 534.
(4) [1897] P. 105.

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THE DUC D'AUMALE (No. 2).

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services afterwards they are extricating themselves and their tow from a difficulty in which both are placed by joint negligence.

In this case the services of the tug consisted in towing the *Duc d'Aumale*, in fine weather, from a position off Dungeness to Calais. The owners and master of the tug cannot recover for the reasons I have given, and the crew did nothing more than their ordinary duties towards their owners and master with little or no risk. It may very well be that there might be a case of joint negligence producing a disaster to a tow, where a man might be put on board the tow, or be required to perform services entirely outside the ordinary duties of tug and tow. When such a case arises it can be dealt with.

In this case it seems to me that it would be bad policy to encourage sailors, as it were, to hope and expect that their master might get the ship he was towing into danger, so that they would have to render services for which they could recover. I think that would be introducing something extremely novel into this Court, and what appears to me to be a dangerous kind of policy. On the whole it seems to me that I am right in holding that no salvage award can be recovered in this case by anybody connected with the tug. My judgment, therefore, must be that the suit of the plaintiffs is dismissed. I think, in the circumstances under which the case has come before the Court—they are peculiar—the proper order will be that the parties shall each pay their own costs.

Solicitors for plaintiffs, the owners, master, and crew of the tug *Challenge*: *Lowless & Co.*

Solicitors for defendants, the owners of the *Duc d'Aumale*, her cargo and freight: *William A. Crump & Son.*

T. L. M.

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July 11.

THE ELSWICK PARK.

Admiralty—Salvage—Signals of Distress properly made—Services not required—Merchant Shipping Act, 1894 (57 & 58 *Vict. c.* 60), *s.* 434, *sub-s.* 2.

By the Merchant Shipping Act, 1894, s. 434, sub-s. 2, the improper use or display of the signals of distress, authorized by the Act, renders the master of a vessel liable to pay compensation for any labour undertaken, risk incurred, or loss sustained, in consequence of the signal being supposed to be a signal of distress; but the sub-section does not, by implication, give any right to compensation in favour of those who, in response to signals of distress properly used or displayed, offer services which are not required.

CONSOLIDATED ACTIONS OF SALVAGE.

The plaintiffs were the owners, masters, and crews of the steam-tugs *Dragon*, *Petrel*, *Verne*, *Queen*, and *Albert Victor*.

The defendants were the owners of the steamship *Elswick Park*.

The case is reported only on the interpretation to be placed on sub-s. 2 of s. 434 of the Merchant Shipping Act, 1894. (1)

The facts, so far as material, were shortly as follows:—

About mid-day on February 26, 1903, the *Elswick Park*—a steel screw steamship of 3403 tons gross register, from London to Cardiff in water ballast, and of the value of 27,000*l.*—when about seven miles S.W. of Portland Bill broke her intermediate tunnel shaft. There was a fresh westerly gale blowing with some sea, and two black shapes, to indicate that the vessel was not under command, were hoisted, whilst the code signal for a tug was exhibited, and the forestay-sail set

(1) 57 & 58 Vict. c. 60, s. 434: "(1.) Her Majesty in Council may make rules as to what signals shall be signals of distress, and the signals fixed by those rules shall be deemed to be signals of distress.

"(2.) If a master of a vessel uses or displays, or causes or permits any person under his authority to use or display, any of those signals of distress, except in the case of a vessel being in distress, he shall be liable to pay compensation for any labour undertaken, risk incurred, or loss sustained in consequence of that signal having been supposed to be a signal of distress; and that compensation may, without prejudice to any other remedy, be recovered in the same manner in which salvage is recoverable."

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to steady the vessel, which, with her head to the N.N.E., drifted slowly seawards with the tide which was about one hour ebb. About 2 P.M., in answer to the signals, the *Queen*—a paddle steam-tug of 169 tons gross register, 70 horse power nominal, seven hands, and of the value of 6000*l.*—and the *Albert Victor*—a paddle steam-tug of 128 tons gross register, 70 horse power nominal, seven hands, and of the value of 4000*l.*—came out from Portland. The *Queen* was at once made fast; but the *Albert Victor*, in attempting to make fast, drifted across the bow of the *Elswick Park*, and, after sustaining some damage, fouled the *Queen's* hawser, which was slipped by the *Queen* and taken by the *Albert Victor*, but shortly afterwards parted.

The *Dragon*—a steel screw-tug of 167 tons gross register, 99 horse power nominal, ten hands, and of the value of 7000*l.*—and the *Petrel*—a twin-screw tug of 55 tons gross register, 28 horse power nominal, five hands, and of the value of 2500*l.*—then came up and made fast ahead, the *Albert Victor* towing astern; but the rope of the last named parted, and the *Queen* took her place, whilst the *Verne*—a steel screw-tug of 42 tons gross register, 30 horse power nominal, five hands, and of the value of 3000*l.*—made fast ahead of the *Petrel*. As they neared the Narrows, the *Albert Victor* made fast astern of the *Queen*, and, after taking a pilot on board off the Breakwater Fort, the *Elswick Park* was, about 6 P.M., brought to an anchorage in Portland Roads, the towage of about fourteen miles having lasted from four to five hours.

Between 1 and 2 A.M. on the 27th, in answer to rockets in the roadstead, the *Queen* and the *Verne* went out to the *Elswick Park* and found that, owing to the heavy weather, she had dragged her anchors and drifted athwart the hawse of the steamship *Gwentland* (1), and the plaintiffs alleged that

(1) In respect of this collision, the owners, master, and crew of the *Gwentland* brought an action [1903 G. No. 374, fol. 113] against the owners of the *Elswick Park*, for the damage sustained and for subsequent alleged salvage services rendered by the *Gwentland* to the *Elswick Park*. Bucknill J. found (July 10, 1903) that the *Elswick Park* was alone to blame by reason of the want of proper precautions to prevent fouling the *Gwentland*; but the learned judge dismissed the claim for salvage.

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the *Queen* made fast alongside and, with the *Verne*, stood by all night. About 10 A.M., the weather having moderated, the *Dragon* and the *Petrel* towed the *Elswick Park* clear.

The defendants admitted that salvage services had been rendered to the *Elswick Park* by the tugs *Dragon*, *Petrel*, and *Queen*, but denied that the *Verne* or the *Albert Victor* were entitled to any salvage remuneration, as their services were not necessary, and the one had made fast ahead of the *Petrel*, and the other astern of the *Queen*, without the consent and against the will of the master of the *Elswick Park*. The defendants further alleged that, during the night, whilst the *Elswick Park* was foul of the *Gwentland*, flares were burnt and rockets fired but no assistance came, nor could assistance in the circumstances have been rendered, as the *Elswick Park* had lashed herself alongside the *Gwentland*, and so prevented herself from doing or receiving any further damage, until the next morning, when she was towed away by the *Dragon* and the *Petrel*.

Aspinall, *K.C.* and *A. E. Nelson*, for the plaintiffs, the owners, masters, and crews of the *Dragon*, *Petrel*, and *Verne*.

Lauriston Batten, for the plaintiffs, the owners, masters, and crews of the *Queen* and *Albert Victor*. The evidence shews that the owners of these two tugs keep their vessels always under steam at Weymouth to help vessels in distress, and have agents on the look-out along the coast to warn them of any vessel needing assistance. The *Queen* was at the time employed by the War Department, and the *Albert Victor* by the flagship of the Home Squadron off Weymouth; but they were replaced by stand-by steamers, and at once sent off to the *Elswick Park*. In *The Envoy* (1) Butt J. said that "one of the most important functions of this Court is to encourage the maintenance of powerful and efficient steam-tugs around our coasts, to be in constant readiness to assist vessels in distress." The Court will therefore look favourably on their exertions.

As to their services, after the *Dragon* and *Petrel* had made fast ahead, the claim for salvage remuneration made by the

(1) Feb. 28, 1888. See Kennedy on the Law of Civil Salvage, p. 118.

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Albert Victor is stronger than in the case of *The Auguste Legembre* (1), where a tug, at the request of the master of a tug already employed by the master of the salved vessel, made fast ahead of that tug, in spite of the remonstrance of the master of the salved vessel. As it turned out, the services of the tug were not in fact required; but her owners, master, and crew obtained a salvage award, the Court holding that it was reasonably prudent and necessary for the salved vessel to have the services of the tug. In the present case the master of the *Elswick Park* saw what was being done and made no objection. It was also reasonably necessary for the *Albert Victor* to tow astern of the *Queen* to steady that tug, and keep the *Elswick Park* from breaking her sheer.

Secondly, under the Merchant Shipping Act, 1873, s. 18, the display of any of the signals of distress specified in the schedule to that Act rendered the master liable to pay compensation for any labour undertaken in consequence of the signal being supposed to be a signal of distress. That provision is repeated in s. 434, sub-s. 2, of the Merchant Shipping Act, 1894, and it follows by implication from that sub-section that those who go out in answer to signals properly made will be entitled to remuneration as salvors. In *The Ranger* (2) Dr. Lushington held that though a vessel which had got into a situation of danger, but had extricated herself before the arrival of salvors, could not be made liable for salvage on the ground that no service had been performed, the expenses of the parties who had attempted to render the service should be allowed.

Such services are in the nature of "engaged" services—that is, services rendered at request—in which case, though no actual benefit results to the property in peril, and its ultimate preservation is not thereby effected, still the Court will decree a salvage award, as, for example, where an anchor is fetched from the shore, but never reaches the vessel which is ultimately salved: *The Undaunted*. (3)

Laing, *K.C.*, and *Dunlop*, for the defendants, the owners of the *Elswick Park*. The five tugs claiming salvage in this case

(1) [1902] P. 123. (2) (1845) 9 Jur. 119.
(3) (1860) Lush. 90.

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raced with one another to get out to the assistance of the *Elswick Park*, and the *Queen*, with the *Albert Victor* close after her, were first on the scene; but they did nothing, for, as soon as the *Queen* had made fast, the *Albert Victor*, in her anxiety to get hold also, broke the *Queen's* rope, and, when the *Albert Victor* got that rope, it parted. The *Dragon* and the *Petrel* then made fast ahead, whilst the *Albert Victor* tried to tow astern; but the rope parted, and when the *Queen* took her place, the *Albert Victor* made fast astern of the *Queen*, the *Verne* also making fast ahead of the *Petrel*. In that tandem fashion neither the *Albert Victor* nor the *Verne* were of any use. They were there against the will of the master of the *Elswick Park*, who could have cast off their ropes if they had been fast to his own vessel; but they thrust their services upon him unasked, and he was powerless to prevent them remaining fast to the tugs ahead and astern. In *The Auguste Legembre* (1) the doctrine as to the Court deciding whether it is reasonably prudent and necessary for a tug to make fast ahead of another tug, in spite of the remonstrance of the master of the salved vessel, was pushed to its utmost limits, and should not be further extended.

Secondly, as to the claim made on behalf of the *Queen* and the *Verne* for going to the assistance of the *Elswick Park* during the night when she was foul of the *Gwentland*. The defendants deny that any services were, or could be, rendered, and it is submitted that s. 434 of the Merchant Shipping Act, 1894, does not, by implication, give a right to remuneration in such a case, for the object of sub-s. 1 is to authorize the making of rules as to what signals shall be signals of distress, and the obvious and sole object of sub-s. 2 is to forbid a master to use or display any of those signals unless his vessel is in distress—that is to say, a penalty, in the form of liability to pay compensation, is imposed on the master if he improperly displays signals of distress; but the sub-section does not confer any right to salvage in favour of those who do not render any effectual service, though they go out in answer to signals properly made.

(1) [1902] P. 123.

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BUCKNILL J. [The learned judge, acting on the advice of the Elder Brethren of the Trinity House who were assisting him, found that the *Elswick Park* was in considerable peril at the time when the *Queen* and the *Albert Victor* went out in answer to her signals, and that when the flood tide made, with the wind in the same westerly quarter, the vessel would be in danger of being lost. The learned judge then dealt with the services of these two tugs, and also with those rendered by the *Dragon* and the *Petrel*, and with regard to the *Verne* held that her services were accepted in the sense that the master of the *Elswick Park* saw what she was doing, and allowed her to do it. The learned judge continued :—]

Now with regard to the *Queen*. She did something to begin with, by towing the vessel's head round and on to the course, and then she steered astern. That is admitted. It is a good service and a valuable one. And early the next morning she went out in answer to signals made by the salved ship when, as we know (1), that ship was dragging her anchors and dangerously approaching another ship, with which she afterwards came into collision. She tendered her services, which were not accepted because the two vessels after they came into collision were lashed together, and were both riding safely to their anchors at that time ; so that there was no necessity to have assistance, and it was not wanted. It has been suggested by counsel that under s. 434 of the Merchant Shipping Act, 1894, the *Queen* is entitled to be remunerated for labour undertaken, risk incurred, or loss sustained in consequence of having answered the signals which were properly made by the ship which made them. The 2nd sub-section runs in this way : [The learned judge read sub-s. 2, already set out, and continued :—] I read that sub-section as clearly meaning that where a person makes an improper use of signals, attracting a vessel or vessels, that the improper use of those signals is to be penalised by paying the vessel which comes out compensation for labour, risk, or loss sustained in consequence of answering those signals. I do not think that that sub-section has any application to this case, for the signals in

(1) See ante, p. 77, n. (1).

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Bucknill J.

this case were made properly at the time they were made, but by the time the *Queen* got out her services were not required.

[The learned judge then reviewed the services of the five tugs, and continued:—] With regard to the *Queen* and the *Albert Victor*. The *Queen* must receive a substantial award. She was first out there, and she is one of those tugs which are kept up at considerable expense by her owners, for the express purpose of being always ready to go out when wanted. She steered the *Elswick Park* well, and I think the admission in the defence that the steamer "assisted by the *Queen* steered well" indicates that the pleader was instructed to say that the *Queen* did her work well. I cannot take into consideration the alleged services of the *Albert Victor* when astern of the *Queen*. I have asked the Elder Brethren this question: Do you think that it was reasonably proper or necessary for those on the *Queen* to have engaged the services of the *Albert Victor*? The reply is in the negative. The *Albert Victor* will be paid something for going out and getting hold, and doing her best when her services had been engaged, and I shall remunerate her; and I have taken into consideration the expenses, admitted to be reasonable, of repairing the damage caused to the *Albert Victor* whilst performing salvage services. The *Dragon* will get 1000*l*., the *Petrel* 750*l*., the *Verne* 350*l*., and the *Queen* and the *Albert Victor* together 850*l*.—in all 2950*l*.

Solicitors for plaintiffs, the owners, masters, and crews of the steam-tugs *Dragon*, *Petrel*, and *Verne*: *Lowless & Co.*

Solicitors for plaintiffs, the owners, masters, and crews of the steam-tugs *Queen* and *Albert Victor*: *Pritchard & Sons.*

Solicitors for defendants, the owners of the steamship *Elswick Park*: *Thomas Cooper & Co.*

T. L. M.

[DIVISIONAL COURT.]

1903
Nov. 3.

THE PRINCE LLEWELLYN.

Admiralty—Salvage—Appeal—Practice—Reduction of Award—Costs.

Where the amount of a salvage award is reduced, the general rule, laid down in *The Gipsy Queen*, [1895] P. 176, is not to give costs, but an appellant succeeding in considerably reducing the award will be allowed the costs of the appeal.

The Kilmaho, (1900) 16 Times L. R. 155, followed.

APPEAL in an action of salvage against an award of the judge of the Pembrokeshire County Court.

The appellants (defendants) were the owners of the *Prince Llewellyn*, her cargo and freight. The respondents (plaintiffs) were the owners of the *Bessie Barr* and her master and crew.

The facts, so far as material, were shortly as follows :—

On January 11, 1903, the *Prince Llewellyn*, a small schooner of 91 tons register with four hands, and carrying 170 tons of phosphate of lime, left Treport in France for Amlwch in Anglesea in fine weather; but the next day, off Portland, the wind increased to a gale, and on the 14th, off the Lizard, the vessel was found to be making water. By the 16th, when off the coast of South Wales and about abreast of Skomer Island, the weather became very bad, with a strong S.E. wind, and some of the schooner's sails were blown away, whilst the pumps were unable to keep the water down. As the crew were much exhausted, signals of distress were hoisted, and the steamship *Bessie Barr*—of 153 tons register and valued at 6000*l.*, with eleven hands, and a cargo of coal from Garston to Bristol—came up and towed the schooner in about eight hours, during which the hawser parted three times, from about three miles N.E. of the Bishops in the St. George's Channel into Fishguard Bay, a distance of sixteen miles. Whilst coming to anchor a collision occurred between the two vessels, and the schooner sustained some damage. Her crew went ashore in the lifeboat, but returned the following day, when the *Bessie*

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Barr towed the schooner further up the harbour and gave some assistance in pumping.

The plaintiffs, the owners of the *Bessie Barr* and her master and crew, by their particulars of demand claimed 300*l.* for the services rendered, and the defendants, the owners of the *Prince Llewellyn*, counter-claimed for 20*l.*, the cost of repairing the damage caused by the collision.

At the hearing on March 11, 1903, the learned county court judge made an award in favour of the plaintiffs of 160*l.* with costs, and dismissed the counter-claim of the defendants on the ground that there was no negligence on the part of the salvors. According to the shorthand writer's notes of the judgment, the learned judge said "that the conclusion arrived at by the Court was that the services rendered were very meritorious, and that some risk to lives was run by the salvors, and much more by the salved. The vessel had no other assistance. The Court also found that there had been the very best manœuvring of the ships, and that the damage was not caused by the *Bessie Barr*, but by the *Prince Llewellyn*. The learned assessors told him to assess the services rendered at 160*l.*"

The valuation of the *Prince Llewellyn* made by the appraiser of the county court was: The schooner, 100*l.*; the cargo, 170 tons at 10*s.*, 85*l.*; freight, 170 tons at 5*s.* 6*d.*, 46*l.* 15*s.*—less advanced, 15*l.*—31*l.* 15*s.* Total, 216*l.* 15*s.*

On appeal:—

Lauriston Batten and *Samson*, for the appellants (defendants), the owners of the schooner and of her cargo and freight. The award is bad as, according to the note of the judgment, it is that of the assessors and not of the judge. It is also so excessive as to be unreasonable, being nearly four-fifths of the value of the property salved, with the result that, after payment of the taxed costs, there will be practically nothing left for the owners. In *The City of Chester* (1) Lindley L.J. said: "The primary object of saving a ship and her cargo from loss is to preserve them for their owners, and this object would be

(1) (1884) 9 P. D. 182, at p. 202.

defeated if the remuneration awarded to the salvors were so large as to deprive the owners of the saved ship and cargo of all benefit from their preservation. This consideration at once limits the amount of the salvors' remuneration; for, however meritorious their services, salvors are never awarded such a sum as to make their services useless to those who have to pay for them. . . . The risk of getting little by reason of the comparatively small value of the property saved is one of those risks which salvors always run." In *The Inca* (1) Dr. Lushington, delivering the judgment of the Privy Council, said that, "after an examination of all the previous cases, no instance can be found in which salvors have had decreed to them a sum exceeding a moiety of the proceeds."

[Reference was also made to *The Accomac.* (2)]

Bailhache and *Rogerson*, for the respondents (plaintiffs), the owners of the *Bessie Barr* and her master and crew. Looking at the value of the salved property only, the award may seem large; but value is only one of the many elements which have to be considered in assessing salvage, and on the hearing of an appeal the rule of the Privy Council, followed in the Court of Appeal, is, according to Brett M.R in *The Lancaster* (3), that, "Assuming that the judge has based his decision on right principles, and with a proper apprehension of the facts," the decision will not be reviewed unless "the amount of salvage is exorbitant in the sense of being beyond reason."

Here the evidence is that the weather was very bad, that the salved vessel was sinking, and the crew exhausted. The learned judge in the Court below found that the services were very meritorious, and that there was risk of life to the salvors and the salved. In *The Erato* (4) Butt J. said, "that there is no hard and fast rule as to the proportion of the saved property which ought to be awarded to the salvors"; and he gave 2000*l.* out of a value of 3750*l.*

In dealing with small values no proportion can be maintained if the salvors are to be adequately remunerated. In *The*

(1) (1858) 12 Moo. P. C. 189, at p. 196.
(2) [1891] P. 349.
(3) (1883) 9 P. D. 14.
(4) (1888) 13 P. D. 163, at p. 165.

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Boiler ex Elephant (1) the salvors were awarded 50*l.* and costs out of a value of 58*l.* 3*s.* 4*d.*

Batten, in reply. The facts are practically not in dispute, though the salvors' account is exaggerated; but it is submitted that in the circumstances of this case the amount awarded is out of all proportion to the value of the property salved.

GORELL BARNES J. This is an appeal by the defendants, the owners of the *Prince Llewellyn* and her cargo and freight, to obtain a reduction of a salvage award of 160*l.* made in the Court below in favour of the plaintiffs.

The learned judge said in the course of his judgment that "the learned assessors told him to assess the services rendered at 160*l.*" As I read that short note, I think it conveys that on consulting his assessors they must have thought that was a proper sum in the circumstances, and that the learned judge adopted that view and made it his own judgment. No objection can, therefore, be taken to the judgment on that account.

The appeal is brought to reduce that sum, because it is contended that the amount awarded is so excessive, having regard to the facts, that it ought not to be allowed to stand. In the case of *The Accomac* (2) Lord Esher, in considering the question of reviewing a decision of a Court below with regard to salvage, said: "If, after carefully considering the facts, and, after giving every possible weight to the view of the judge, we think it greatly in excess, and so greatly as to be unjust to the owners of the ship which had been in distress, we are bound to alter the amount by lessening it." And the question which I think we have to consider here is whether the award, having regard to the facts, is so greatly in excess of what ought to be awarded as to be unreasonable. It is not necessary to review the facts at any length. The *Prince Llewellyn* was a small vessel, and her difficulties seem to have commenced at a position which was off Skomer Island, on January 16 last, when the weather was very bad. The wind was either S.E. or S.S.E., and she made her way from that

(1) W. N. (1891) 52. (2) [1891] P. 349.

position round the Bishops, and was picked up, according to the evidence of the plaintiffs, about three miles N.E. of the Bishops. She seems to have been intending, if she possibly could, to get to Fishguard Bay for safety. She was taken in tow by the plaintiffs' ship, the *Bessie Barr*, and brought into the inner part of Fishguard Bay. Some services were rendered there. That is the short outline of the salvage services.

Now, one of the principal features to be considered in this case is the value of the property which was rescued. This, according to the appraisement, is only 216*l.* 15*s.*, against which there has been this award of 160*l.* The services were short. They seem to have been rendered without difficulty. In consequence of the wind being off the land, the sea, although it may have been very high, cannot have been what it would have been if it had been on a lee shore. I suppose for that reason it is that the master of the plaintiff ship says there was no danger to his ship. He was asked: "There was no danger to your ship, then?—No. Was there danger at any time?—Yes. To life?—Yes. In which way?—In getting the ropes aboard. Did that take you long?—We made two or three different attempts. Three altogether?—Yes. There was no risk beyond that from passing the ropes?—Yes, because she was sinking. There was no danger to your vessel?—No, certainly not." The towage lasted a few hours. I doubt very much whether the plaintiffs' vessel was delayed at all by what was done, because there are indications in the evidence that if the plaintiffs' vessel had gone on round the Bishops, or had attempted to do so, she must have been forced to put back. That is rather emphasized by the passage in the letter of the captain to his owners, where he says: "Saturday morning"—this is after they arrived in Fishguard Bay—"the weather still too bad to proceed." It shews that he was delayed partly by bad weather. The actual loss sustained by the plaintiffs was extremely trifling, if there was not much delay—a small amount of damage to the hawsers, and a very small extra consumption of coal. We have considered this case with the assistance of the Elder Brethren of the Trinity House, and my opinion is that the award made in

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Gorell Barnes J.

this case was quite unreasonable, taking all the facts into consideration—so unreasonable that we ought to reduce it. The amount we fix, having regard to all the facts, and doing as much as we can to encourage salvage, without too far exhausting the values rescued by those services, is the sum of 70*l.*

BUCKNILL J. I agree, but I wish to say that I think the judgment is that of the learned judge in the Court below and not that of his assessors. It appears to me that the assessors merely advised the learned judge that in their opinion 160*l.* was the proper amount to award. With regard to the argument addressed to us, that the Court cannot, except under most exceptional circumstances, award more than half the value of the property salved, I think the answer is that each case must be decided upon its own facts. All we have to ask ourselves is: On the evidence and facts before us, was the award so excessive as to be unreasonable?

The services were short; there was no real danger to the salvors except whilst the ropes were being passed. There was no danger to the salving ship during the services. The distance towed was sixteen miles at the rate of about two knots an hour. That the salved vessel was not sinking when she was got hold of is clear, because she was towed for eight hours and did not sink, nor did she sink next day when the people went on board to pump her. The services were meritoriously performed in bad weather. The ropes parted three times; but they were the ropes of the little salved ship. When the ropes of the salving ship were passed they did not part. I think the award was unreasonable, and should be reduced.

Lauriston Batten, on behalf of the appellants, asked for the costs of the appeal.

[GORELL BARNES J. When the amount of the award is reduced, it is not the practice of the Court of Appeal to give costs.]

That is only a general rule of practice, which does not deprive the Court of discretion in the matter. In *The*

Kilmaho (1) the Court of Appeal on reducing the award gave the costs of the appeal to the successful appellant.

Bailhache, contra. In *The Kilmaho* (1) there was a question of duress, and in *The Gipsy Queen* (2) the Court of Appeal, after taking time to consider, laid down the general rule of practice that in a case of salvage where the amount is reduced no costs will be given.

GORELL BARNES J. It is clear from *The Gipsy Queen* (2) that there is no hard and fast rule as to what is to be done with reference to costs in a case where the award is reduced. In the circumstances of this case—as in *The Kilmaho* (1), where the award was considerably reduced—the proper order to make will be that the successful appellants will have the costs of the appeal, the costs in the Court below remaining as they were.

Award reduced from 160*l.* *to* 70*l.* *with costs of the appeal.*

Solicitor for appellants (defendants): *Newton G. Driver, for Smith, Davies & Co., Aberystwith.*

Solicitors for respondents (plaintiffs): *Botterell & Roche, for H. A. Jones-Lloyd, Pembroke Dock.*

(1) 16 Times L. R. 155. (2) [1895] P. 176.

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THE CORDILLERAS.

Admiralty—Limitation of Liability—Foreign Steam Vessel—Gross Tonnage—Order in Council, May 5, 1873, *relating to French Vessels—Double Bottom for Water Ballast—Foreign Certificate—Merchant Shipping Act,* 1894 (57 & 58 *Vict. c.* 60), *ss.* 81, 84, 503, 724, 745.

In an action of limitation of liability by the owners of a French steam vessel constructed with a double bottom for water ballast, a duly authenticated copy of the Order in Council of May 5, 1873, was produced shewing that French vessels are to be deemed to be of the tonnage denoted in their certificates of registry, and the French certificate of registry was annexed to the usual affidavit verifying the statement of claim. This certificate gave the gross tonnage exclusive of the double bottom, and a certificate of a French surveyor stated that the space between the inner and outer plating of the double bottom was not available for the carriage of cargo, stores, or fuel :—

Held, by Gorell Barnes J., that this was a sufficient compliance with the provisions of ss. 81, 84, and 503 of the Merchant Shipping Act, 1894, and enabled the gross tonnage of the vessel to be calculated upon which the plaintiffs' statutory liability in damages was based.

The Zanzibar, [1892] P. 233, followed, and applied to a French vessel.

Action for limitation of liability.

The plaintiffs were the Société Anonyme des Chargeurs Réunis of Havre, in the Republic of France, owners of the steamship *Cordilleras*. The defendants were the owners of the steamship *Poplar*, and all other persons claiming to have sustained damage or injury by reason of a collision between the steamships *Cordilleras* and *Poplar*.

The facts, so far as material, were shortly as follows :—

On February 8, 1902, the plaintiffs' steamship *Cordilleras*, from London to Havre with a general cargo, came into collision in the river Thames with the steamship *Poplar*, in consequence of which the *Poplar* received considerable damage, and having been abandoned by her crew, with her helm jammed and her engines going ahead, she, before running ashore, came into collision with, and did damage to, other vessels, including the steamship *Morocco* and seven barges, and also came a second time into collision with the *Cordilleras*.

The present defendants, the owners of the *Poplar*, commenced an action against the owners of the *Cordilleras* in

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respect of the collision, and on June 5, 1902, the Court held the *Cordilleras* alone to blame, and condemned her owners in the amount of damage caused by and consequent on the collision. The owners of the *Cordilleras* appealed so far as they were held liable for the damage subsequent to that directly caused by the first collision; but the judgment of the Court below was affirmed.

The owners of the *Morocco* commenced an action against the owners of the *Cordilleras* to recover the amount of damage caused by the collision between the *Morocco* and the *Poplar*, and an action was also commenced by the Mercantile Lighterage Company against the owners of the *Cordilleras* in respect of the damage to their barges through collision with the *Poplar*.

The statement of claim in the present action alleged that the collision with the *Poplar*, and the consequent collisions, occurred without the actual fault or privity of the plaintiffs, and they, as the owners of the *Cordilleras*, now sought a stay—except for the purpose of taxation and payment of costs—of all proceedings in respect of their liability for the damage caused by and consequent on the collision between the *Cordilleras* and the *Poplar*, upon payment into court, with interest at the rate of 4 per cent. per annum from the date of the collision, of the sum of 26,098*l.* 1*s.* 7*d.*, being 8*l.* per ton on 3262·26 tons, being the gross tonnage of the *Cordilleras* without deduction on account of engine room.

Affidavits by a member of the firm of solicitors of the plaintiffs, and by the pilot of the *Cordilleras*, were filed by the plaintiffs stating that, from inquiries made, no loss of life or personal injury was occasioned by the collision between the *Cordilleras* and the *Poplar* or the consequent collisions, and, for the purpose of calculating the gross tonnage upon which the statutory liability of the plaintiffs in damages was based, the affidavit, filed in support of the statement of claim, annexed (with translation), the certificate, dated February 26, 1896, of French nationality of the *Cordilleras*, from which it appeared that the special tonnage of the vessel for the payment of the subsidies provided by the law of January 30, 1893, was 3353·72 tons, whilst the gross measurement, according to the 1889

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decree, was 3262·26 tons, the difference, 91·46 tons, being due to the space between the inner and outer plating of the double bottom of the vessel, which was occupied by the water-ballast tanks, and which an affidavit by the director of the plaintiff company, and another by a French surveyor, stated was not available for the carriage of cargo, stores, or fuel. (1)

A duly authenticated copy of an Order in Council, made at Windsor May 5, 1873, relating to the tonnage measurement of ships of France (2), was also put in which, omitting formal parts, is as follows :—

(1) Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 81: "In the case of a ship constructed with a double bottom for water ballast, if the space between the inner and outer plating thereof is certified by a surveyor of ships to be not available for the carriage of cargo, stores, or fuel, then the depth required by the provisions of rule 1 relating to the measurement of transverse areas shall be taken to be the upper side of the inner plating of the double bottom, and that upper side shall, for the purposes of measurement, be deemed to represent the floor timber referred to in that rule."

A "surveyor of ships" is a surveyor appointed by the Board of Trade—see s. 724, sub-s. 1, "The Board of Trade may, at such ports as they think fit, appoint either generally or for special purposes, and on special occasions, any person they think fit to be a surveyor of ships for the purposes of this Act, and a person so appointed (in this Act referred to as a surveyor of ships) . . . ."

In the schedules to the Act the following reference to the double bottom for water ballast occurs in Sched. II. (2): ". . . . find the transverse area of the ship at each point of division of the length as follows: Measure the depth at each point of division, from a point at a distance of one-third of the round of the beam below the tonnage deck, or, in case of a break, below a line stretched in continuation thereof, to the upper side of the floor timber at the inside of the limber strake, after deducting the average thickness of the ceiling which is between the bilge planks and limber strake (subject, however, to the provisions of this Act in the case of a ship constructed with a double bottom for water ballast) . . . ."

(2) Merchant Shipping Act, 1894, s. 84, sub-s. 1: "Whenever it appears to Her Majesty the Queen in Council that the tonnage regulations of this Act have been adopted by any foreign country, and are in force there, Her Majesty in Council may order that the ships of that country shall, without being re-measured in Her Majesty's dominions, be deemed to be of the tonnage denoted in their certificates of registry or other national papers, in the same manner, to the same extent, and for the same purposes as the tonnage denoted in the certificate of registry of a British ship is deemed to be the tonnage of that ship."

Sect. 745, sub-s. 1 (*a*): "Any Order in Council . . . . made . . . . under any enactment hereby repealed shall continue in force as if it had been made . . . . under this Act."

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"Whereas by the Merchant Shipping Act Amendment Act, 1862, it is enacted that whenever it is made to appear to Her Majesty that the rules concerning the measurement of tonnage of merchant ships for the time being in force under the principal Act have been adopted by the Government of any foreign country, and are in force in that country, it shall be lawful for Her Majesty by Order in Council to direct that the ships of such foreign country shall be deemed to be of the tonnage denoted in their certificates of registry or other national papers; and thereupon it shall no longer be necessary for such ships to be re-measured in any port or place in Her Majesty's dominions, but such ships shall be deemed to be of the tonnage denoted in their certificates of registry or other papers, in the same manner, to the same extent, and for the same purposes in, to, and for which the tonnage denoted in the certificates of registry of British ships is deemed to be the tonnage of such ships.

"And whereas it has been made to appear to Her Majesty that the rules concerning the measurement of tonnage of merchant ships now in force under the Merchant Shipping Act, 1854, have been adopted by the President of the French Republic and are in force in the French dominions.

"Her Majesty is hereby pleased by and with the advice of Her Privy Council to direct that the ships of France, the certificates of French nationality and registry of which are dated on or after the first day of June one thousand eight hundred and seventy-three shall be deemed to be of the tonnage denoted in the said certificate of French nationality and registry."

Laing, K.C., and *Stubbs*, for the plaintiffs, the owners of the *Cordilleras*. Under s. 84 of the Merchant Shipping Act, 1894, the ships of any foreign country, in respect of which an Order in Council has been made, shall for the purposes of the Act be taken to be of the tonnage specified in their certificates of registry or other national papers. A copy of an Order in Council relating to French ships has been produced. It is dated in 1873, and was made under the corresponding powers

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conferred by s. 60 of the Act of 1862 (25 & 26 Vict. c. 63). It was kept alive by s. 745 of the present Act, and is therefore still in force.

The certificate of French nationality annexed to the affidavit verifying the statement of claim shews that the gross measurement of the *Cordilleras* is 3262·26 tons. This measurement is down to the ballast tanks, the space occupied by them being proved by the affidavits of the director of the French company and of a French surveyor not to be available for the carriage of cargo, stores, or fuel.

It is submitted that this is evidence upon which the Court will act in ascertaining the gross tonnage of this vessel for the purpose of calculating the statutory liability in damages.

Lauriston Batten, for the defendants, the owners of the *Poplar*.

D. Stephens, for the interveners, the owners of the *Morocco*. The owners of the *Cordilleras* as plaintiffs seeking to limit their liability are not entitled to the deduction of 91·46 tons in respect of the water-ballast tanks, for they cannot limit the measurement to the upper side of the inner plating of the double bottom so as to exclude the space between the inner and outer plating; or, if under *The Zanzibar* (1) they are so entitled, it can only be done on production of the certificate of a surveyor of ships appointed by the Board of Trade shewing that the space is not available for the carriage of cargo, stores, or fuel: see ss. 81 (2) and 724 (2), and Sched. II. (2) of the Merchant Shipping Act, 1894—that is to say, before 1889 the measurement was, under the Merchant Shipping Act, 1854, s. 21, sub-s. 2, to be to the upper side of the floor timber. Then, by s. 5 of 52 & 53 Vict. c. 43, in the case of a ship constructed with a double bottom for water ballast, the upper side of the inner plating of the double bottom was to be taken to represent the floor timber; but only on the certificate of a surveyor appointed by the Board of Trade that the space was not available for the carriage of cargo, stores, or fuel. It is further submitted that though the effect of s. 84 of the Merchant Shipping Act, 1894, coupled with the Order in Council,

(1) [1892] P. 233. (2) Ante, p. 92, n. (1).

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may be that the tonnage denoted in the certificate of registry of a French ship is to be deemed to be equivalent to the tonnage denoted in the certificate of registry of a British ship, that is not for the purposes of a limitation suit, as s. 503 of the Act, under which this suit is brought, specially provides by sub-ss. (*b*) and (*c*) for the mode in which the measurement of a foreign ship shall be made with a view to ascertain the tonnage for the purposes of that section; the result being that there are certain provisions of the Act which cannot be complied with by the owners of a foreign ship, as in the case of *The Cathay* (1), a Danish ship, where—though the point, as to s. 84 of the Act not applying to a limitation suit, was not taken—it was held that the owners as plaintiffs in a limitation suit could not avail themselves of the provisions of the second paragraph of s. 503, sub-s. 2 (*a*), of the Act in respect of a deduction of crew space as they were unable to produce the certificate required under Sched. VI. of the Act.

Balloch, for owners of cargo on the *Morocco* intervening.

Laing, *K.C.*, in reply. The case of *The Cathay* (1) is distinguishable, as there the owners of the foreign ship were unable to make a deduction from the gross tonnage, because the certificate mentioned in the 3rd paragraph of Sched. VI. of the Merchant Shipping Act, 1894, had to be given by a surveyor of ships to the collector of customs at the time when the ship was registered, or re-registered. In the present case no deduction is sought to be made from the gross tonnage; the only claim is that in measuring for the gross tonnage the measurement shall be to the upper side of the inner plating of the double bottom, because in ascertaining the gross tonnage for the purposes of the Act the ballast tanks are not measured. This was so decided in *The Zanzibar* (2) in the case of a British ship; and as proof has been produced that the space in question is not available for the carriage of cargo, stores, or fuel, the same mode of measurement will be applied to the ships of those foreign countries which are shewn by an Order in Council to have adopted the tonnage regulations of the Act.

Before the Order in Council this foreign ship would have

(1) (1900) 9 Asp. M. L. C. 100. (2) [1892] P. 233.

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been measured, or her measurement certified under the sections of the earlier Acts now represented by s. 503, sub-s. 2 (*b*), (*c*), of the Merchant Shipping Act, 1894. Under these provisions, combined with s. 5 of 52 & 53 Vict. c. 43 (now s. 81 of the Act of 1894), the double-bottom space would have been excluded if proved not to be available for the carriage of cargo, stores, or fuel. The effect of the Order in Council is to prevent the necessity for re-measurement here, and the tonnage denoted in the certificate of registry of the foreign ship is to be deemed to be the tonnage of that ship. If, therefore, evidence is produced similar to that which would have been produced in the case of a British ship as to the space included in the double bottom, the requirements of the Act are satisfied.

[The following sections of the Merchant Shipping Act were also referred to: As to the survey and measurement of a ship, ss. 6, 77; as to documents admissible in evidence, ss. 64, sub-s. 2, 695.]

GORELL BARNES J. The plaintiffs, the owners of the French steamship *Cordilleras*, are seeking to limit their liability under s. 503 of the Merchant Shipping Act, 1894, which applies to both British and foreign vessels, and there seems no doubt that, subject to certain points which have been discussed, they are entitled to a decree in the usual form.

The points discussed turn on the question of the tonnage upon which the owners of the *Cordilleras* are to be held entitled to limit their liability. According to the section to which I have referred, the tonnage of a steamship shall be her gross tonnage without deduction on account of engine room, and, according to the affidavit filed on behalf of the director of the plaintiff company, the *Cordilleras* is a steamship of the gross tonnage, without deduction on account of engine room, of 3262·26 tons. Annexed to the affidavit is the certificate of French nationality, with a translation, and in that I find that the gross measurement, according to what is referred to as the 1889 decree, is put at the same figure as that mentioned in the affidavit, namely, 3262·26 tons.

The tonnage which is mentioned in the affidavit and certi-

ficate was arrived at after deducting from a larger figure the measurement of the water-ballast tanks which are in the bottom of this ship. The director of the company in his affidavit says that those water-ballast tanks are 91·46 tons. Now, it was contended on behalf of the defendants, first of all, that under s. 503 this ship ought to be measured according to British law, either under sub-s. (*b*), where she has been and can be measured according to British law, or under sub-s. (*c*), where she has not been and cannot be measured according to British law; but provision is made for ascertaining under the direction of the Court what the tonnage shall be taken to be. It is, however, contended on behalf of the plaintiffs that there is no necessity to have this ship measured under British law, because s. 84 of the Act of 1894 provides that an Order in Council may declare that the tonnage denoted in the certificate of registry or other national papers of a foreign ship shall be accepted for the same purposes as the tonnage denoted in the certificate of registry of a British ship, and a copy of such an Order in Council relating to French ships has been produced dated in 1873, which has been kept alive by sub-s. 1 (*a*) of s. 745 of the Act of 1894, and, therefore, by virtue of s. 84, and of the Order in Council, the tonnage certificate of this ship is adequate for the purpose of this limitation suit.

It is, however, objected on behalf of the defendants that the certificate in question does not shew compliance with s. 81 of the Act—that is to say, that there is no sufficient evidence that the water-ballast spaces are not available for the carriage of cargo, stores, or fuel.

Affidavits have now been filed, which include a certificate by a French surveyor, shewing that the water-ballast tanks are not, and cannot be, used for such purposes, and the question is whether the Court will act upon the French certificate coupled with these affidavits.

The case of *The Zanzibar* (1) has been referred to, and I think it is clear that the learned President in that case was of opinion, when dealing with the sections of the Acts of 1854, 1862, and 1889, that the words of the Act of 1854 exclude

(1) [1892] P. 233.

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the measurement of these water-ballast tanks from the gross tonnage, and he said that at any rate the Act of 1889 had made the point quite clear, and that the space was to be excluded. Now, all that he had before him appears to have been a copy of the register, fortified by affidavits. So he had nothing before him to shew that s. 5 of 52 & 53 Vict. c. 43, had been complied with by obtaining the certificate of a surveyor appointed by the Board of Trade. It seems to have been taken for granted that when the certificate of a British ship was put in, shewing the gross tonnage, that gross tonnage would be taken as practically certified, and that all that was necessary to be dealt with in arriving at it had been dealt with by proper certificates.

The point does not seem to have been taken that there was no certificate specially brought before the Court. It, therefore, appears that in an ordinary limitation suit, where the certificate of registry is put in and supported by affidavit, the gross tonnage will be taken in the ordinary way, and the limitation amount calculated upon that certificate without the necessity of adducing at the hearing the certificate of a surveyor under s. 81 of the Act of 1894. So that with regard to a British ship there ought to be no difficulty. First, because by the construction of the measurement sections and schedules the water-ballast tanks ought not, as the learned President indicated, to be included, though there is a possible difficulty on account of the words in the 2nd schedule, namely, "subject, however, to the provisions of this Act in the case of a ship constructed with a double bottom for water ballast." (1) But if that be not correct, there is the primâ facie evidence of the certificate, shewing the tonnage, and the inference that what has been necessary to shew that tonnage properly has been complied with.

Then we come to the case of a foreign ship and the application of s. 84 of the Act of 1894, which provides, in the terms I have already mentioned, that Her Majesty may order that the ships of a foreign country shall, without being re-measured, be deemed to be of the tonnage denoted in their certificates of registry or other national papers, in the same manner, to the

(1) Ante, p. 92, n. (1).

same extent, and for the same purposes as the tonnage denoted in the certificate of registry of British ships is deemed to be the tonnage of such ships. Here, again, we get a denotation of the gross tonnage, and I see no reason why I should not hold that that may be treated, for the purpose of limitation proceedings, just in the same way as the denotation of gross tonnage in the certificate of registry of British ships.

The result will be the usual decree of limitation of liability, and, as it will be advantageous to the parties concerned, the time will be limited to two months. Pending actions will be stayed upon payment being made into court in the usual way, and upon security for the costs of the defendants to the limitation suit and for the costs of the appearance by counsel of the owners of the *Morocco* and of her cargo being given to the satisfaction of the registrar. The plaintiffs must pay all the costs of the limitation suit.

Solicitors for plaintiffs, owners of the *Cordilleras*: *Stokes & Stokes.*

Solicitors for defendants, owners of the *Poplar*: *Deacon Gibson, Medcalf & Marriott.*

Solicitors for interveners, owners of the *Morocco*: *Thomas Cooper & Co.*

Solicitor for interveners, owners of cargo on the *Morocco*: *C. E. Harvey.*

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Dec. 3, 4, 5, 10.

THE SUNLIGHT.

Admiralty—Collision—Vessel coming out of Dock into River—Regulations for Preventing Collisions at Sea, 1897, *art.* 19—*Powers of Dock Master—Mersey Dock Acts Consolidated Act*, 1858 (21 *&* 22 *Vict. c. xcii.*), *s.* 49.

A steam vessel, ready to proceed to sea, was stopped by the dock officials in the entrance to the Prince's Dock, Liverpool, and then told by the dock-master she might go, but warned to look out for a tow and her tugs coming down the river. The steam vessel came into collision with the tow and one of her tugs. In an action by the owners of the tow against the owners of the steam vessel for the damage sustained, and by the owners of the steam vessel against the dock board for negligence in ordering the vessel to proceed out into the river when the dock officials knew or ought to have known that it was not safe for her to do so:—

Held, by Bucknill J., that, as against the tow, the steam vessel was alone to blame, for, by the exercise of reasonable care, the lights of the down-coming tow and of her tugs might have been seen in due time, and the collision avoided, the tow and her tugs not being bound by art. 19 of the Regulations for Preventing Collisions at Sea to keep out of the way of the steam vessel coming out of dock on their starboard side.

Secondly, that the action against the dock board failed, for, though under s. 49 of the Mersey Dock Act, 1858, a dock-master may order a ship to leave the premises of the dock board, he had not exercised that power.

Action of damage by collision, and action for negligence in ordering a vessel to leave a dock when it was not safe for her to do so, tried together for convenience.

The plaintiffs in the first action were the owners of the steamship *Maiorese*, and the defendants were the owners of the steamship *Sunlight*. The plaintiffs in the second action were the owners of the *Sunlight*, and the defendants were the Mersey Docks and Harbour Board.

The first action is reported on the question of the starboard side rule not applying in favour of a vessel going out of a dock into a river as against a vessel moving in the river (1); and the

(1) Regulations for Preventing Collisions at Sea, 1897, art. 19: "When two steam vessels are crossing, so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other."

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second action is reported on the question of the control exercisable by a dock-master under the Mersey Dock Acts in respect of vessels leaving a dock. (1)

The material facts were shortly as follows:—

On September 22, 1903, about 11.15 P.M., the tide being flood, running at four to five knots, the wind a moderate breeze from the S.E., and the weather fine and clear, the screw steamship *Maiorese* of 1739 tons gross register, with a crew of fifteen hands, exclusive of the engine department, was, whilst being moved from the Herculaneum Graving Dock to her loading berth at the Wellington Dock, proceeding in charge of a duly licensed compulsory pilot down the river Mersey (as the Court found) about one third of the river off the Liverpool landing-stage, and, having no steam, she was being towed from either bow, at the rate of three to four knots over the ground, by the tugs *Stormcock* and *Fighting Cock*, which were sounding long blasts. The steamship was exhibiting the lights for a vessel in tow without steam, and her tugs were exhibiting the towing and under-way lights.

When the *Maiorese* was off, and about 300 to 400 yards away from, the north end of the landing-stage, those in charge of the *Maiorese* saw the masthead light of a steamship—which proved to be the *Sunlight*—in the Prince's Half Tide Dock entrance, and immediately afterwards a long blast was heard, and the red light of the *Sunlight* was seen as she rapidly came out of the entrance heading about west. Those in charge of the *Maiorese* ordered both the tugs to stop their engines, which they did, and the helm of the *Maiorese* was hard-a-ported, but

(1) The Mersey Dock Acts Consolidated Act, 1858 (21 & 22 Vict. c. xcii.), s. 49: "Any harbour-master, dock-master, or pier-master may direct the time and manner of any vessel coming into or going out of any dock, and also the time of opening or shutting the dock gates; and if the master of any vessel shall act contrary to the directions or neglect to obey the orders of such harbour-master, dock-master, or pier-master, in relation to the manner of coming into or going out of such dock, or shall obstruct or hinder him in the opening or shutting of any dock gate, such master shall for every such offence be liable to a penalty of not exceeding twenty pounds."

By s. 53 power is given to the harbour-master or, &c., to remove vessels from the entrances to the docks.

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the *Sunlight*, coming on at considerable speed, with her stem struck the starboard side of the *Stormcock*, which at once slipped the hawser, as also did the *Fighting Cock*, to prevent a collision with that tug, and the *Sunlight*, clearing the *Stormcock*, with her port side struck the stem of the *Maiorese*, doing considerable damage.

The plaintiffs, the owners of the *Maiorese*, charged the *Sunlight* with failing to keep clear, with failing to give due or sufficient notice of her intention to come out of dock, with improperly coming out of the dock entrance without making sure that she could do so with safety to passing vessels, or taking any steps to acquaint herself of their presence.

By their defence and counter-claim the owners of the *Sunlight*—a steamship of 240 tons register, with engines of 112 horse power indicated—alleged that their vessel, just before the time in question, was in the entrance to the Prince's Dock, Liverpool, having been stopped there by the dock officials, and ordered to wait before proceeding out into the river on her voyage to Swansea with a general cargo; that the dock officials then ordered those in charge of the *Sunlight* to let go and come ahead; that the ropes were thereupon let go, and with a long warning blast, the *Sunlight* proceeded out into the river at full speed under a hard-a-port helm; that, on clearing the entrance, those in charge saw the towing and green lights of the two tugs towing the *Maiorese* broad off on their port bow; that the *Sunlight* kept her course and speed, blowing a short blast to indicate how her helm was; but that the tugs and tow, instead of keeping clear, under art. 19 of the Regulations for Preventing Collisions at Sea, ran into the *Sunlight*; and the owners of the *Sunlight* further alleged that "if the *Sunlight* came out of dock improperly it was because those on board her so went out in obedience to the orders of the dock officials, which orders those on the *Sunlight* were bound to obey."

In the second action, the plaintiffs, the owners of the *Sunlight*, charged the defendants, the Mersey Docks and Harbour Board, with so negligently and unskilfully undocking the *Sunlight* as to bring her into collision with the *Maiorese* and the *Stormcock*, their statement of claim alleging that the *Sun-*

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light was being undocked under the direction and control of the servants of the defendants, the Mersey Docks and Harbour Board, and "acting in obedience to the orders of the defendants' servants, the dock officials, the *Sunlight* was brought from her berth in Trafalgar Dock to the Prince's entrance and instructed to wait in the entrance, which she did. Shortly afterwards the *Sunlight* was ordered by the said defendants' servants to let go and come ahead so as to proceed into the river. The *Sunlight* thereupon let go her ropes and proceeded out into the river. As soon as the *Sunlight* cleared the entrance she found herself in such a position that she was unable to avoid colliding with the *Stormcock* and the *Maiorese*." The owners of the *Sunlight* further alleged that "throughout the operation of undocking, the *Sunlight* was acting under the orders of the said dock officials, which orders those on the *Sunlight* were—pursuant to the Mersey Dock Acts—bound to obey, and which orders were duly and promptly obeyed by those on the *Sunlight*," and "the said collision and damage was caused by the negligence of the said dock officials in ordering the *Sunlight* to proceed out into the river as aforesaid, when they knew, or ought to have known, that it was not safe for her to do so."

The defendants, the Mersey Docks and Harbour Board, by their defence did not admit that "at the times alleged the *Sunlight* was under the direction and control of the defendants' servants," and they denied that "in proceeding out into the river the *Sunlight* was acting under any order of the dock officials or other servants of the defendants"; and they further said that, "if any such orders were given as alleged, they were not within the scope of the authority of the defendants' servants." They also denied that "the *Sunlight* was ordered by any servant of the defendants to let go, or to come ahead, so as to proceed into the river, and that the *Sunlight* let go, or proceeded out into the river in obedience to, or in consequence of, the alleged or any orders of any servants of the defendants." And "If it was not safe for the *Sunlight* to proceed out into the river, those on board the *Sunlight* were guilty of negligence which caused or contributed to the collision by casting off and proceeding out, although warned by the dock-master to look

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out for the *Maiorese* and her tugs, and by failing to take any steps, or any timely or sufficient steps, by stopping the engines, or reversing or otherwise, to avoid the collision."

Pickford, K.C., and *W. S. Glynn*, for the plaintiffs in the first action, the owners of the *Maiorese*. The defence of the *Sunlight* is in effect that the collision occurred in consequence of her being ordered out of dock by the dock officials; but whether the *Sunlight* is herself to blame or whether she can recover over against the Mersey Docks and Harbour Board is not material to the plaintiffs in this action, for, assuming that it is the practice of the dock board to keep some of their servants on the look-out to warn vessels leaving their premises as to the state of the traffic in the river, that would not relieve the ship herself of the obligation to keep a good look-out when going out of dock and to take reasonable steps to avoid collision. The look-out man on the *Sunlight* could have seen the lights of the tugs towing the *Maiorese*, whether that vessel was close into the stage, as those on board the *Sunlight* allege, or farther out in the river, as those on board the *Maiorese* allege, so that the reliance placed by those in charge of the *Sunlight* on the look-out kept by the dock authorities will not avail them as defendants to this action. Again, after the *Sunlight* had got out into the river, those in charge of her acted negligently in not avoiding the collision by dropping down inside so as to let the *Maiorese* and her tugs pass clear.

Laing, K.C., and *Alexander D. Bateson*, for the defendants in the first action, and plaintiffs in the second action, the owners of the *Sunlight*. If the *Maiorese* was, as the plaintiffs in the first action say, well away in the river, the *Sunlight* could have got out in safety; but in fact the *Maiorese* was much nearer in, and hampered the *Sunlight* when that vessel came out by the orders of the dock officials, who ought to have kept a good look-out and warned those in charge of the *Sunlight*. The whistle of the *Sunlight* was blown a long warning blast on the dock-master's order to go, and, on seeing the *Maiorese* and her tugs, a short blast was blown to indicate that the *Sunlight* was porting. These were seamanlike pre-

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cautions, and should have been sufficient to enable the *Maiorese* to keep clear.

As to the case against the Mersey Docks and Harbour Board, the evidence is that the dock-master asked those in charge of the *Sunlight* whether they could clear a hopper, and on the answer that that could be done, the dock-master, as the servant of the dock board, gave the order to go. This order those in charge of the *Sunlight* were bound, under s. 49 of the Mersey Dock Act, 1858, to obey, unless there was manifest danger; but of this those in charge of the *Sunlight* could not be aware, as from the relative position of the two vessels those in charge of the *Sunlight* could not see the *Maiorese* or her tugs. In *Taylor* v. *Burger* (1) a collision occurred between an incoming steamer and an outgoing tug at the entrance of a dock. The tug was held not to blame as she obeyed the order of the harbour-master to go ahead; but the steamer was found alone to blame for disobeying the order of the harbour-master to go astern, and the Earl of Halsbury L.C. in his judgment, after referring to *Reney* v. *Magistrates of Kirkcudbright* (2), said that "if it were once supposed that a person acting under the orders of a harbour-master is to exercise his own judgment whether or not the harbour-master's orders are most consistent with prudence, and then refuse to obey the order given, that would lead to very serious consequences." In the present case those in charge of the *Sunlight* had an order given them to go out, and there was no obvious and manifest danger in obeying the order, and, when they did get out, they came into collision with the *Maiorese*, because that vessel and her tugs had a bad look-out and were proceeding too fast, the result being that, not having seen the lights of the *Sunlight* in time, their speed was not reduced, and they were unable to keep out of the way.

Aspinall, K.C., and *Maurice Hill*, for the defendants in the second action, the Mersey Docks and Harbour Board. Whatever view is taken of the acts of the dock-master and of his subordinates, it is clear that those in charge of the *Sunlight* were bound to keep a good look-out, and in that duty they

(1) (1898) 8 Asp. M. L. C. 364. (2) [1892] A. C. 264.

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failed. There were one and a half hours to spare, so that there was no hurry to clear the dock entrance, and the dock-master did not order the vessel out, he having neither the necessity cast upon him nor a duty incumbent upon him to do so; but assuming that he did, if there was time and opportunity for the *Sunlight* to avoid the consequences of obeying a wrongful order, then her owners cannot recover against the dock board—that is to say, if the owners of the *Maiorese* are successful in the first action, then that involves negligent management of the *Sunlight*, in which case the defendants, the dock board, must, according to common law rules, be successful in the second action.

Laing, K.C., in reply in the second action. The effect of the argument on behalf of the dock board is that the dock-master had no authority to order the *Sunlight* out; but it is clear from the terms of the statute and the necessities of the position that he has such power, and the weight of the evidence is all in favour of the view that he exercised it. The dock board admit that they do keep a look-out when vessels are leaving the dock entrance; and it is a reasonable precaution to take, as the master of the vessel going out cannot at the same time keep a look-out on the pier-head. It is admitted that the *Sunlight* had been stopped by the orders of the dock-master, and then the evidence is that those in charge of the vessel received the order to go ahead, which was obeyed in the belief that the servants of the dock board were doing their duty by keeping a good look-out. If the *Maiorese* and her tugs were in fact nearer in, as those in charge of the *Sunlight* say they were, then the *Maiorese* and her tugs could not be seen by those in charge of the *Sunlight* until they had cleared the north end of the entrance.

Pickford, K.C., in reply in the first action. The *Sunlight* did not blow her warning blast until she had let go and was proceeding out. The inference to be drawn by those in charge of the *Maiorese* and her tugs was that the *Sunlight* would wait until they had gone by.

Cur. adv. vult.

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Dec. 10. BUCKNILL J. On September 22, between 11 and 12 o'clock at night, a collision occurred in the river Mersey between the steamships *Maiorese* and *Sunlight*. The next day an action was commenced by the owners of the *Maiorese* against the *Sunlight*, and on September 28 an action was begun by the owners of the *Sunlight* against the *Maiorese*. Those actions were consolidated. On October 20 a statement of claim was delivered by the owners of the *Maiorese*, and on October 27 a defence and counter-claim was put in by the owners of the *Sunlight*. On the same day a letter was written by the solicitors for the owners of the *Sunlight* to the solicitor for the Mersey Docks and Harbour Board, drawing attention to the fact that it was alleged that improper orders had been given by the dock board's officials to those on board the *Sunlight* to proceed into the river, and asking what course the Mersey Docks and Harbour Board proposed to take in the matter. That was answered the next day by the solicitor to the harbour board denying liability. On the same day that that letter was received the owners of the *Sunlight* commenced an action against the Mersey Docks and Harbour Board.

The case of the *Maiorese* is that she was being moved by two tugs, the *Stormcock* and the *Fighting Cock*, from the Herculaneum Graving Dock to her loading berth at the Wellington Dock. The tugs were on either bow, the *Maiorese* herself having no steam up, and the tide was flood of the force of about five knots. The pleaded case is that the *Maiorese* was being towed down well to the eastward of mid-stream, making about three to four knots over the ground. Then the pleadings allege that when the *Maiorese*, in charge of a compulsory pilot, was about off the north end of the Liverpool landing-stage, and 300 to 400 yards off it, the masthead light of the *Sunlight* was seen in the Prince's Half Tide Dock entrance; that then a long blast was heard from the *Sunlight*, whose red light was seen, and which rapidly came out from the dock entrance, heading about west; that the tugs of the *Maiorese* were told to stop, and they did so and cast off, but a collision took place between the *Sunlight* and the *Stormcock*, and then the port side of the *Sunlight*, about in the way of the engine-room, was

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struck by the stem of the *Maiorese*, which penetrated so far into her as to leave her in a condition in which she might have sunk had she not been towed ashore.

The defence set up by the owners of the *Sunlight*, is that the *Sunlight* was in the entrance to the Prince's Dock, having been stopped there by the dock officials; that she was ordered by the dock officials to let go and come ahead; that she thereupon blew a long blast, and under a hard-a-port helm proceeded out into the river at full speed; that as soon as she cleared the entrance the towing and green lights of the tugs towing the *Maiorese* were seen broad off on the port bow and about 200 to 250 yards distant; that the *Sunlight* kept her course and speed, blowing a short blast to indicate how her helm was, and the collision took place. In the defence, the charges made against the owners of the *Maiorese* are that the *Maiorese* and her tugs neglected to keep clear of the *Sunlight*, and also to slacken their speed or to cast off the tow-ropes or stop or reverse their engines. Then it is charged that the *Maiorese* and her tugs neglected to avoid crossing ahead of the *Sunlight*, and negligently navigated too close in to the dock entrances. It is further said that if the *Sunlight* came out of dock improperly it was in obedience to the orders of the dock officials, whose orders those on the *Sunlight* were bound to obey.

Now as to the claim by the owners of the *Sunlight* against the Docks and Harbour Board. The statement of claim alleges that the *Sunlight* was stopped by the authorities in the place where we know she was lying; that throughout the operation of undocking she was acting under the orders of the dock officials, which orders those on the *Sunlight* were, pursuant to the Mersey Dock Act, bound to obey; and that the collision was caused by the negligence of the dock officials in ordering the *Sunlight* to proceed out into the river at a time when they knew, or ought to have known, that it was not safe for her to do so. That is denied by the Docks and Harbour Board in their defence.

The first question I have to decide is, Where in fact did this collision take place in regard to mid-channel? The river

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off the landing-stage may be said roughly to be 1100 to 1200 yards wide, and on the part of the *Maiorese* it is said that she was proceeding down the river—that is to say, to the northward in tow of these two tugs, which were ahead of her, about 300 yards off the eastern shore, or off the stage. I find as a fact that this vessel was going down with her tugs, I will not say exactly 350 to 400 yards, but very much further off the stage than the witnesses of the *Sunlight* allege they were. If I may put it roughly, I should say they were going down about one-third of the width of the river off, perhaps a little less, from the stage—that is to say, I believe the story told by the *Maiorese*. It is also probable that the hopper went down about ahead of the *Maiorese*, or, putting it in another way, the *Maiorese* went down in the wake of the hopper, which was said to have been 300 yards off the landing-stage, and that has not been denied. But there is a stronger point than that which leads me to this conclusion, and that is that the hopper had rounded and gone down inside the *Maiorese* and then got ahead of her. All this shews that there was much more room than the *Sunlight* alleges between the *Maiorese* and the landing-stage.

The second question is, Where was the collision with regard to the bearing of the dock gates? Now, the dock gates are not in a line with the landing-stage, because at the northernmost part of the landing-stage the jetty runs N.E., and inside the line of the landing-stage and not quite N.E. of this line are the so-called two islands at the entrance to the Prince's Half Tide Dock. I am satisfied on the evidence that the collision took place about off the north end of the landing-stage, and a little northerly of that—that is to say, if a line is drawn from the jetty about one-third of its way up and taken about west, that would be about the place where the collision happened.

The third question is this: Could those on the *Sunlight* have seen the lights of the tugs or tow whilst the *Sunlight* was still in the half-tide gateway? This has been a very important question to decide—one not free from difficulty and one upon which a great deal depends, and the matter stands in this way.

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The *Sunlight*, which is 194 feet long or thereabouts, had been stopped by the dock-master in what I may call the first position: that is to say, she would be further in, or further from the river, than in the second position. Could those on the *Sunlight*—that is, anybody in authority at the moment for the purpose of looking out—the master on the bridge, or the look-out man forward—have seen in the first position the lights either of the tugs or one of them, or of the tow, or the lights of all three? If either the master on the bridge or the man forward could have seen the towing lights of one of the tugs, or the side-lights of one of the tugs, or the starboard side-light of the *Maiorese*, that would be quite enough, because he would be able to see there were moving lights in the river coming towards the north. In spite of what has been said by the dock-master, who was not sure whether in the first position the look-out man on the forecastle head, or the master on the bridge, could have seen these lights, I am of opinion that one of them could have seen them; in other words, I find that in position No. 1 all the lights of the tugs and tow would not be concealed from both the look-out man forward and the master on the bridge. They might be concealed from one, but they would be open to the other. And it must be remembered that the lights on the jetty, &c., which have been referred to, would be stationary, and these lights of the tugs and tow were all moving; and it is clearly the duty of the master or the look-out man of a vessel which is in dock and about to go out into the river to watch for moving lights. But that does not conclude the case at all, because there is the position No. 2 of the *Sunlight*, when the *Sunlight* had come more towards the river, but not into it, with her starboard check-rope made fast to the third or fourth bollard, and there was a moment when that rope led aft. If the *Sunlight* is put into that position and is stationary, with her engines still at rest, I am satisfied beyond all doubt that then the look-out man on the *Sunlight* must have seen, if he had looked, the lights of the tugs, or, at all events, of the *Stormcock*, and, I believe, the starboard light of the *Maiorese*. He saw nothing. I find as a fact they could have been seen. They

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were seen by others. The dock-master says he saw them himself, but he is not quite certain of the position in which he was when he saw them, and therefore I do not place much weight upon his evidence on that point. But I find as a fact that the man who was placed on the corner of the knuckle to the northward of the dock entrance did see and did report, not only the lights of the hopper, but the lights of the vessels which were coming down astern of her. The master of the *Sunlight* said that if the down-coming ship, the *Maiorese*, and her tugs, were where it is alleged by the plaintiffs they were—that is to say, not 150 yards, but between 300 and 400 yards off the landing-stage—those on the *Sunlight* ought to have seen them. Finding as I do that these vessels coming down were from 300 to 350 yards off, and that their lights were reported by the look-out man on the knuckle, I have come to the conclusion of fact that those on board the *Sunlight* could have seen the lights of the down-coming ship. It does not follow that they did not see them, though they said they did not.

The next question is, Could the *Sunlight* have avoided the collision after she was in the river? This is a question with regard to which I rely upon the judgment of those who sit here to assist me on nautical matters. I have asked the Elder Brethren this: Could the *Sunlight*, by the exercise of reasonable care and skill, have avoided this collision? I am advised by the Elder Brethren, and I have no doubt that by the exercise of reasonable skill the *Sunlight* might have avoided the collision after she got into the river. There was, in my opinion, and I am so advised, ample room and opportunity for the collision to have been avoided if, instead of keeping on full speed ahead under hard-a-port helm, the engines had been stopped and reversed and the helm not kept hard-a-port but eased off, so that she would have been then drifting up, broadside, to the southward. There would have been plenty of room between her and the down-coming ships. I am also advised that she might have done something else. After she came out into the river her head was N.W. by W., and when she struck the *Stormcock* her head was W. by S., so that she had altered four

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points. If, instead of keeping on under hard-a-port helm she had hard-a-starboarded her helm and had altered two or three points she would have been able to have gone, the tide being with her, up river to the southward, and in all probability clear of the *Maiorese* and her tugs. But I am not so firm on this point as I am on the first. I am advised that there were two ways in which the collision could have been avoided; but I prefer to put my judgment upon the first. Not taking such steps was negligence on the part of the master of the *Sunlight*, who in all probability thought that the starboard side rule applied, and that he was justified in keeping on full speed ahead under hard-a-port helm, and that it was the duty of the other vessel to keep out of his way. I do not consider that art. 19—that is, the starboard side rule—applied. I find that the *Sunlight* was negligently navigated, and had a bad look-out, which contributed to the collision. But did it not cause it entirely? I am of opinion that it did. It is alleged in the pleadings that the *Maiorese* might have done something to avoid the collision, but I find as a fact that she could not have done anything more than was done. Those in charge of the *Maiorese* ordered the tugs to stop, and they did stop as soon as they saw this other vessel coming down.

The next question I have to determine is whether the excuse pleaded by the *Sunlight* is good in law or in fact. The owners of the *Sunlight*, having made the dock board defendants to the action brought by them, allege that if the navigation of the *Sunlight* was negligent it was the fault of the dock-master in ordering the vessel out into the river at a time when he ought not to have done so. That is a mixed question of fact and law. I have no doubt that the dock-master had, under the Act of Parliament, power to order a ship, which has paid her dues and is ready to go, to leave the premises of the dock board. But though that is the legal position, looking at it generally, one must apply the facts in each particular case. First of all, as a fact, did he order the *Sunlight* out? I am satisfied that the dock-master did not order the vessel out, or say anything which amounted to an order. I find that, in fact, no order was given by the dock-master to the *Sunlight* to go out, and that the

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master of the vessel went out at his own risk, and navigated his own ship out—not against the order of the dock-master—the dock-master could not stop him; but he cast off his own rope, by his own man, who was there for the purpose, by his order; and I find as a fact that the dock-master did point out to him, and warn him of, the lights of the down-coming ship. The probable solution of this case is that the master of the *Sunlight* wanted to get to sea, and miscalculated the strength of the tide, and having cleared the hopper satisfied himself that he could clear the other vessel too, and so ran the risk. The result must be that the *Sunlight* as against the *Maiorese* is solely to blame, and that the owners of the *Sunlight* must lose their case against the dock board because they have not made good the allegations contained in their statement of claim.

Solicitors for plaintiffs in the first action, the owners of the *Maiorese*: *Hill, Dickinson, Dickinson, Hill & Roberts, Liverpool.*

Solicitors for defendants in the first action, and plaintiffs in the second action, the owners of the *Sunlight*: *Collins, Robinson & Driffield, Liverpool.*

Solicitors for defendants in the second action, the Mersey Docks and Harbour Board: *W. C. Thorne, Liverpool.*

T. L. M.

1903
Dec. 4.

In the Goods of WILLIAM SMITH, the Younger.

Probate—Colonial Probates Act, 1892 (55 & 56 *Vict. c.* 6)—*Limited Grant—Resealing.*

A Colonial grant, though limited, may be resealed in the United Kingdom, provided that the proper conditions prescribed by the Colonial Probates Act, 1892, have been complied with.

This was an application, on motion to the Court, rendered necessary in consequence of objections having been raised by the registrars at the Principal Probate Registry to resealing a Colonial grant which was limited in form.

William Smith was domiciled and resident in the island of St. Vincent, West Indies, at the time of his death on April 1, 1900.

At that time there was in a box in the Colonial Bank at Kingstown, St. Vincent, certain deposit receipts and other documents standing in his name, but which were in fact part of the estate of George Smith, who died in 1894 domiciled and resident in St. Vincent, and of whose estate William Smith was administrator.

After the death of William Smith the Supreme Court of Judicature in St. Vincent granted letters of administration de bonis non, in respect of the estate of George Smith, to Elspet Smith, his widow, and she applied for and, on June 28, 1901, obtained, from the Court in St. Vincent, letters of administration in the estate of William Smith, limited to "all the moneys and interests standing in the Colonial Bank in St. Vincent on deposit or otherwise in the name and to the credit of the said William Smith, and also so far only as concerns all the moneys in a box in the said bank left there for safe custody by Alexander Smith, William Alexander George Nanton, and Conrad Johnson Simmons, and the following securities, namely, (1.) the Colonial Bank of New Zealand deposit receipt for the sum of 50*l.*, dated 20th December, 1884, and numbered 181,194, and the moneys thereby secured; (2.) the Colonial Bank of New Zealand deposit

receipt for the sum of 100*l.*, dated the 1st July, 1890, and numbered 8453, and the moneys thereby secured; (3.) the East London Savings Bank book, shewing a deposit of 10*l.* in favour of the said William Smith, and the moneys thereby secured," being the property of George Smith in the hands of William Smith as above stated.

It was now sought to have the said letters of administration resealed with the seal of this Court pursuant to the provisions of the Act 55 & 56 Vict. c. 6 (the Colonial Probates Act, 1892). All the next of kin of William Smith had consented to and made affidavits in support of the application of Elspet Smith for the limited grant of letters of administration in the Colonial Court.

The circumstances leading up to the present motion were these.

As the facts were thought to be somewhat special, the solicitors for the applicant considered it desirable to put them into writing and lay them before one of the principal registrars of the Probate Division before making a formal application to have the grant resealed.

Accordingly, on October 24, 1903, a letter in the following terms was written by the solicitors and addressed to the registrar:—

"Sir,—On the 28th June, 1901, letters of administration of the effects (limited as after mentioned) of William Smith, the younger, who died on April 1st, 1900, at St. Vincent, where he was domiciled, were granted by the Supreme Court of Judicature in St. Vincent to Elspet Smith, widow of George Smith, of whose estate his brother, William Smith, was administrator.

"William Smith received various sums of money belonging to the estate of George Smith, which, according to the custom of St. Vincent, were deposited in his own name, and not as administrator, and included a deposit of 50*l.* at the Colonial Bank of New Zealand, another for 100*l.* at the same bank, and 10*l.* in the East London Savings Bank.

"The letters of administration granted in 1901 as above were limited to some money in St. Vincent and to the funds

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above specified, and they were granted upon the renunciation and with the consent of Alexander Smith, Isabella Nanton, Margery Smith, and Rosalie Mitchell, the sole next of kin of the deceased.

"The letters of administration and office copies of the several renunciations are here, and Elspet Smith desires to have them resealed with the seal of the English Court to enable her to obtain payment of the sums in this country, amounting to about 160*l*.

"On September 19th, 1903, letters of administration to the effects of the said William Smith, the younger (except those included in the grant of 1901, which is therein mentioned), were granted by the Court in St. Vincent to Alexander Smith, one of the next of kin.

"The next of kin of William Smith, the younger, considered the said Elspet Smith, under the circumstances above stated, to be a creditor of the intestate as regarded the securities specified in the grant to her, and therefore renounced and consented to it.

"The above facts can, if necessary, be verified by the affidavit of Elspet Smith, and no doubt by an independent party.

"We shall be glad to know whether, under these circumstances, the letters of administration of June 8th, 1901, will be resealed on presentation, as in the case of a Scotch or Irish grant, or what further evidence will be required.

"It will be observed that the assets are very small, and it is therefore desirable to save expense as much as possible."

To this letter a reply was sent from the Probate Registry, declining to enter into the question in writing, but offering a personal interview.

The solicitors accordingly attended at Somerset House, and the registrar whom they then saw, after inspecting the documents, expressed a decided opinion that the letters of administration could be resealed as desired.

The notice required by the rules was thereupon inserted in *The Times* newspaper; a bond was entered into; and the usual affidavit made; and the papers were duly lodged to be

resealed; but, on applying to have them handed out, the solicitors were informed that the registrars had considered the matter and found there had been no similar case before; and that, as the Colonial Probates Act only said that letters of administration "may" be resealed, and not that they "must" be resealed, they (the registrars) would not establish a precedent.

The solicitors, being doubtful whether these statements had really been authorized by the registrars themselves, considered it only fair to give the registrars an opportunity of correcting them.

With that object, and also in order that no dispute should arise as to the facts in case the matter should eventually go before the Court, the solicitors wrote a further letter, addressed to the principal registrars, as follows:—

"28th November, 1903.

"Gentlemen,

"*William Smith, deceased.*

"The facts of this case are fully stated in our letter of the 24th October, 1903. In consequence of your reply objecting to enter into the question in writing we attended on the 27th October, and the registrar in attendance at once said that the letters of administration granted by the Court in St. Vincent could be resealed here as desired.

"We accordingly gave notice by advertisements, as required by your orders, of the intended application, and obtained and lodged the necessary affidavits and bond; but, to our surprise, on applying for the letters resealed, we were informed that as this was the first application of the kind, and as the Act of Parliament used the word 'may' and not 'must,' the registrars refused to allow the letters of administration to be resealed.

"This statement seems so utterly incredible that we considered it would be an injustice to you to take further action and publish such a statement without giving you an opportunity of correcting it, if not correct.

"Moreover, it is very desirable that, in any future development of this case, there should be no dispute as to facts, as

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many people would be inclined to doubt that such an objection could have been raised.

"There always must be a first case, and, therefore, if this is one, that can be no objection; and if the point raised as to the words 'may' and 'must' had any weight, it would simply enable an application to be capriciously refused.

"Our client is much inconvenienced by the delay and has already been put to some expense, so we should not feel justified in letting the matter drop.

"As there can be no mistake about a written statement, though there may be about a verbal one, we think it better, notwithstanding your previous letter, to write to you; and, unless we receive a reply within a week stating in what respects (if any) the above statement is inaccurate, or on what grounds you refuse to reseal the letters of administration granted in St. Vincent, we shall assume that the statement is accurate and that there is no other ground than that above stated for refusing the application to reseal.

"Your obedient Servants,

"Pickering & Neilson.

"The Registrars,

"Somerset House."

To this also the registrars refused a written reply, but again offered an interview, at which the solicitors were told that the refusal to reseal was not grounded upon the word in the Act being "may" and not "must," but because they had a discretion under the Act, and they declined to make a precedent. It was, moreover, suggested that the grant by the St. Vincent Court was ultra vires, though they declined to say in what respect it was so, and stated that they were not obliged to give reasons.

The present notice of motion was thereupon filed.

Barnard, for the applicant. The head office of the Colonial Bank of New Zealand being in England, the bank in St. Vincent, to which was made the application that the securities held by them should be handed over, referred the matter to London; and the head office here refuses to part with the

securities until the limited grant of administration has been resealed here. The Colonial Probates Act, 1892, s. 2, contains no limitation as to the kind of grant which may be resealed. The word "may" is used in every Act which confers fresh jurisdiction; for example, in the Matrimonial Causes Act, 1857, conferring jurisdiction to grant decrees of judicial separation.

[BUCKNILL J. The difficulty I feel is as to what there is to be done here, which could not be done in St. Vincent.]

It is necessary to get the authority of the Colonial Bank of New Zealand here, in order to draw the money which is on deposit, that bank having no branch in St. Vincent. The other point raised by the registrars was as to the whole grant being ultra vires.

BUCKNILL J. You need not trouble about that. The facts set out in the letters to the registrars should be verified by affidavit; and, upon that being done, as I am of opinion that the limited grant in the Colonial Court was properly made, this Court has power under the Colonial Probates Act, 1892, to order the grant to be resealed. I, therefore, order that it be resealed.

Solicitors: *Pickering & Neilson.*

H. D. G.

1903
Nov. 14, 16, 17.

THE HAWTHORNBANK.

Admiralty—Damage—Collision—"Not under Command"—Regulations for Preventing Collisions at Sea, 1897, *art.* 4 (*a*), (*c*).

Two sailing vessels were approaching one another so as to involve risk of collision, the one close-hauled on the starboard tack, shewing her green light to the other, the other running free shewing her red light; but also exhibiting two red lights as signals that from an accident she was "not under command," and, therefore, could not get out of the way. The close-hauled vessel being unable to luff owing to the presence of the green and masthead lights of a steam vessel on her starboard bow, put her helm up, and would have crossed the bows of the vessel running free, had not that vessel defeated the manœuvre by porting. In an action of damage by collision:—

Held, by Gorell Barnes J., that the vessel running free was alone to blame, as she had indicated by her two red lights and side-lights that she was not under command, and was making way through the water. She should, therefore, have kept her course so as to enable the close-hauled vessel—otherwise entitled to keep her course—to get out of the way.

Whether a vessel is, in the circumstances, "not under command," so as to justify her, under art. 4 of the Regulations for Preventing Collisions at Sea, in exhibiting the appropriate signal, is a nautical question for the assessors.

Action of damage by collision.

The plaintiffs were the owners, master, and crew of the *Ringleader*, and the owners of her cargo. The defendants were the owners of the *Hawthornbank* and her freight.

The material facts were shortly as follows:—

On October 16, 1903, about midnight, the *Ringleader* of Faversham—a wooden brigantine of 162 tons register, from the Tyne to Folkestone with a cargo of 292 tons of coal, seven hands, and a pilot—was in the English Channel some five miles S.W. of Dover. There was a strong wind from W.N.W., the weather was clear but overcast, and the tide was running to the westward with a force of about a knot. The vessel was making from two to three knots, close-hauled on the starboard tack, heading about S.W. ½ W. magnetic, under jib, foretopmast staysail, two topsails, two mainstaysails, and single reefed mainsail.

In these circumstances a red light was observed nearly

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ahead; but on the starboard bow withal, distant from one to two miles. Shortly afterwards another red light was seen a little broader on the starboard bow, and when, after a further interval, a third red light appeared distant about a quarter of a mile, those in charge of the *Ringleader* concluded that the approaching vessel was not under command, and—as they were unable to port owing to the presence of a steamer shewing her masthead and green lights on their starboard bow—they starboarded the helm; but shortly afterwards came into collision with the vessel which still kept her port light open, the *Ringleader* being struck by the stem of the other vessel on the starboard side of the bowsprit, and so much damaged that she shortly afterwards sank, the pilot being drowned, and the cargo and crew's effects lost. The main charge made against the other vessel was that though exhibiting the lights of a vessel "not under command" she, by porting her helm, failed to keep her course.

The other vessel proved to be the *Hawthornbank* of Glasgow, a steel barque of 1369 tons gross register, from Antwerp to San Pedro, U.S.A., with a cargo of rails, twenty-two hands, and a Trinity House pilot. She had received damage by collision in the English Channel and was putting back to the Thames in distress. Her foretopmast and headstays with sails and gear had been carried away, her stem was broken, and her bows stove in above water. A tug had been engaged to take her in tow; but the tow-line had slipped before it was hauled on board, and the tug was following and hauling in the tow-line, whilst the barque, under her lower maintopsail, was moving through the water at about three knots, heading about E.N.E. magnetic, and exhibiting, besides the side-lights and a stern-light, the regulation red lights for a vessel not under command. (1)

(1) Regulations for Preventing Collisions at Sea, 1897, art. 4: "(*a*) A vessel which from any accident is not under command shall carry at the same height as the white light mentioned in art. 2 (*a*) where they can best be seen, and, if a steam vessel, in lieu of that light, two red lights, in a vertical line one over the other, not less than six feet apart, and of such a character as to be visible all round the horizon at a distance of at least two miles . . . ."

"(*c*) The vessels referred to in this

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According to the defence and counter-claim, the red light of the vessel which proved to be the *Ringleader* was seen about two miles distant, and bearing three to four points on the port bow of the *Hawthornbank*. As the red light approached the helm of the *Hawthornbank* was ported a point and steadied; but the *Ringleader*, shutting in her red and opening her green light, appeared to be attempting to cross the bows of the *Hawthornbank*, and the collision occurred, the *Hawthornbank* sustaining some damage to her bows. The main charge made by the defendants against the *Ringleader* was that that vessel improperly starboarded. (1)

Aspinall, K.C., and *A. E. Nelson*, for the plaintiffs, the owners of the *Ringleader* and others. The *Hawthornbank* was proceeding at considerable speed, and was in fact under command. It was only at the last moment, when she had failed to get fast to the tug and saw the *Ringleader* ahead, that she exhibited the two red lights; and then it is clear, from the relative position of the two vessels and the angle of the blow, that the *Ringleader* was shewing her green to their red light. The *Ringleader*, having the duty of getting out of the way suddenly thrust upon her, could not luff owing to the steamer's green light on her starboard bow, and, therefore, those in charge of her rightly starboarded.

If the *Hawthornbank* was, when under her lower maintopsail only, not under command, then she had brought herself into that condition by improperly reducing sail, and, therefore, having voluntarily put herself out of command, she was not at the material time, within the meaning of art. 4 (*a*), not under command from any accident.

Whenever the *Hawthornbank* did in fact exhibit the two red lights she thereby gave notice that other vessels must get out of the way; but to enable other vessels to do so she must keep

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article when not making way through the water shall not carry the side-lights, but when making way shall carry them."

(1) The further defence of compulsory pilotage was not proceeded with, as the Court found that there was a bad look-out on the *Hawthornbank*, and, therefore, that her owners were liable.

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her course. She, however, by porting frustrated the manœuvre of the *Ringleader* and so brought about the collision. Those in charge of the *Hawthornbank* were probably busy looking after the tug and expecting every minute to get fast, so that the look-out forward was not sufficiently vigilant, and did not properly inform the pilot as to what light the *Ringleader* was shewing.

Pickford, K.C., and *Adair Roche*, for the defendants, the owners of the *Hawthornbank*. The *Hawthornbank* was not under command as she had been seriously damaged forward through an accident, namely, the previous collision, and was, therefore, properly exhibiting the two red lights. Those in charge of her were endeavouring to get the tug to make fast before entering more crowded waters. For that purpose they had done their best to stop her way, and had, some two hours before, reduced sail, but she was making sufficient way through the water to justify those in charge of her in exhibiting the side-lights as well as the two red lights. The inference to be drawn is that the red lights were not seen, in proper time, by those in charge of the *Ringleader* owing to defective look-out, and, although the vessels were red to red, and although the *Hawthornbank* had properly ported, before risk of collision arose, to give the *Ringleader* more room, and then steadied, yet the *Ringleader* hastily starboarded and brought about the collision, those in charge of her not realizing that the exhibition of the side-lights indicated that the *Hawthornbank* was forging ahead. The steamer alleged to have hampered those in charge of the *Ringleader* by shewing her green light on their starboard bow was in fact the tug following the *Hawthornbank*, and was much further astern, so that there was no danger from her.

The question when a vessel can properly be said to be "not under command" was much discussed in *The P. Caland*. (1)

[GORELL BARNES J. That is a nautical question in respect of which I shall take the opinion of the Elder Brethren who are assisting the Court in this case.]

A. E. Nelson, in reply.

(1) [1893] A. C. 207.

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GORELL BARNES J. The case of the *Ringleader* in substance is that those in charge of her noticed the red light of the *Hawthornbank* nearly ahead, but slightly on the starboard bow, about a mile and a half off; that afterwards a second red light was seen about in the same position; and that afterwards a third red light was seen in the same position, or thereabouts; that when the third red light came into sight the vessels were about a third of a mile apart. The plaintiffs also say that they saw the lights of a steamer a little broader on the starboard bow than the lights of the *Hawthornbank*; and according to the evidence of the master of the plaintiff vessel the lights of that steamer seemed to him to be about the same distance off as those of the barque. On that point there was a conflict of evidence, because the defendants sought to make out that the lights of this steamer, which proved to be the tug of the *Hawthornbank*, were really a good deal further away from the brigantine than the plaintiffs' witnesses put them. However that may be, the case for the plaintiffs is that when they got all these three red lights of the barque in sight, pretty close to, they came to the conclusion that she was a vessel not under command, and that they must act; and thereupon they acted by starboarding their helm in the hope of getting across the barque's bows, being unable, according to the view of the master, who was the responsible man to act, to do anything else, because if they had luffed by porting they would have thrown themselves under the bows of the steamer, and if they had kept on their way they would have gone into the barque; and so he starboarded.

The case of the *Hawthornbank*, shortly stated, is that she had, the day before, received damage by collision in the English Channel, and was putting back in distress with the object of making the Thames and, no doubt, procuring the repairs rendered necessary by the first collision, which had, according to her master, damaged her stem, forcing it across to starboard, carried away all the head gear and foretopmast, stove in her bows, and done some other damage. The *Hawthornbank* had taken a pilot, had engaged a tug, and was endeavouring to make fast to that tug. There had been two attempts to get a

tow-line on board. The first attempt failed just as the line was about to be made fast, and the second attempt also failed, and the tug had again to occupy itself in hauling in the steel hawser. From that time, up to the collision, the *Hawthornbank*, which, when they first tried to take a tug, had broached to, was proceeding with only the lower maintopsail set; that is to say, for about two hours before the collision she sailed under the lower maintopsail, and during those two hours the tug was getting in the tow-rope after the first attempt and was making the second attempt to get fast.

There is no doubt that two red lights in addition to the sidelights were put up, and the case for the *Hawthornbank* is that those two red lights were put up at about ten o'clock, in the mizzen rigging, on the starboard side, at a proper height, so as to shew that the vessel was not under command. They then say that they saw the red light of the *Ringleader* something like two miles, or thereabouts, away, three or four points on the port bow. That is the pleaded case, but the master of the *Hawthornbank* said a mile to two miles off. It is then stated that the red light of the *Ringleader* kept open and gradually broadened on their port bow, and that after they saw the light, when the *Ringleader* was a considerable distance off, they ported about a point, and then steadied, so as to give, according to the master of the defendants' ship, more room, and to enable the *Hawthornbank* to steer better. Then their case is that the *Ringleader* shut in her red light, when about four or five ship's lengths off and about six points on the port bow, and shewed her green light, as if attempting to cross the bows of the *Hawthornbank*, and shortly afterwards the collision happened.

Now, those two cases present certain difficulties. The first question is what were the manœuvres of these two vessels, involving the further questions at what time were the lights put up on the *Hawthornbank*—the plaintiffs contending that these extra red lights were only put up at the last moment before the collision, and the defendants contending that they were put up about two hours before—and what was the relative position of the two vessels to one another at the material time.

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I think that the weight of the evidence is in favour of the view, which I adopt, that the two extra red lights were put up somewhere about ten o'clock. I think it is probable that was so from the fact that that seems to have been about the time when the vessel was in difficulties with her tug; and they seem to have had those lights up from that time onwards to the collision. With regard to the manœuvres of the two ships, I accept the plaintiffs' view that the vessels were green to red—that is, that the *Ringleader* had the other vessel slightly on the starboard bow—whereas the defendants' case is that the two vessels were red to red, but I cannot see how the defendants' story can be correct on this point. In the first place, the courses on which the vessels were favours the view which the plaintiffs present. In the second place, if the vessels were red to red, as the defendants suggest, there could be no reason for the plaintiffs' starboarding in the way it is said by the defendants they did; because if they were red to red the *Ringleader* had only to keep her course and avoid the two difficulties in her way, namely, the *Hawthornbank*, which they would pass easily, and the steamer, which would have to keep out of her way. Again, I cannot see how the collision—which undoubtedly took place between, in the first instance, the starboard side of the *Ringleader's* bowsprit and afterwards her bows, and the port bow, near the stem, of the *Hawthornbank*—could have occurred on the story told by the defendants; because if it were correct to say that the plaintiffs' vessel got six points on the port bow of the defendants' vessel and then starboarded, and the ships were proceeding at the same speed as they had been going, I do not see how it is possible to bring about a collision with the bows of the *Hawthornbank*, and at an angle leading aft. I therefore accept the view of the position of the ships and the general outline of the story of the navigation told by the plaintiffs.

There are still left some questions of difficulty. The first relates to the charge against the plaintiffs that their helm was improperly starboarded. That involves, I think, bad look-out, because it is said that if these two extra red lights were up, those in charge of the *Ringleader* ought to have seen

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them; but I think a good look-out was being kept on the *Ringleader*. I think the men were doing their duty and looking out as well as they could. They saw the first red light—that is, the side-light—of the *Hawthornbank* at a considerable distance, although they did not see the other two lights at the same time. They first saw one, and then they saw another, and I think it is quite possible that the lights may have had some obscuration from the masts or the rigging of the *Hawthornbank* because they were hung three or four feet to starboard of the mizzenmast. It is obvious that anybody on the port bow, fine on the bow, might have something between them and those lights, especially if the vessel were not keeping quite steady on her E.N.E. course. The exact obscuration would depend upon how the vessel was moving. Then, again, the lights were globular, which would not necessarily come into view so readily or so brightly as the side-light which was first seen. I am satisfied that those on board the *Ringleader* saw the two extra side-lights as soon as they reasonably could be expected to do so.

The question whether those in charge of the *Ringleader* were wrong in starboarding depends very much on the opinion of the nautical assessors who are assisting me. If the plaintiffs are right in saying that the steamer which they saw appeared to be about the same distance off as the ship, there certainly was a position of very considerable difficulty, because there was the *Hawthornbank* intimating by her signals that she was out of command, a little ahead of the *Ringleader*, and the steamer on the starboard bow. The master of the *Ringleader* did not know that it was a tug at the time. It might be any steamer coming up. It might be a large steamer, and if he luffed it would throw him right under the bows of that steamer. To get rid of that difficulty, the defendants try to make out that the tug was farther away. My view is that the master of the *Ringleader* was justified, from what he saw, in thinking that the steamer was pretty close to him, in the same way as the barque was, when he made out that the barque was not under command. It must not be forgotten that the tug's side-lights may have been shewing more brilliantly than those of

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the barque, and, therefore, may have produced the appearance of being closer. I am not prepared to accept the defendants' view of this case, that the tug was so far astern as they make out. Some time had elapsed since the last attempt to get the tow-rope fast, and I see no reason why the tug would not make up to the barque again as fast as she could. That being my view, I have consulted the Elder Brethren, and they agree that the plaintiff vessel cannot reasonably be expected to have done differently; in other words, there was no negligence or breach of any rule on her part in starboarding, in the circumstances. The reasons appear to be these: As her master says, it would have been risky to have gone about and ported under the steamer's bows—it would have been a very serious danger if the steamer had been close up—he could not keep straight on with safety, because the vessels were approaching, and so he starboarded and tried to get across the bows of the barque. The only point that can be made against him for doing that is that he said something to the effect that sub-s. (*c*) of art. 4 (1) was not properly in his mind; but I think that, when his evidence is fairly considered, what he meant to convey was very much what he said in his evidence in chief, namely, that he had made up his mind that the vessel shewing the three red lights was a disabled vessel, scarcely having any way through the water, and if he had thought she was going at any great speed he would not have starboarded. That seems to me very much a nautical question, and the Elder Brethren take the view that the plaintiffs' master could not reasonably have done in the circumstances other than what he did do. I think, therefore, he cannot be considered to blame.

Now the other side of the case is also a matter of considerable difficulty. The broad points taken by counsel for the defendants are that the barque was not under command, that she had her proper lights shewing in the circumstances, and that she did nothing wrong. Was the barque under command? Or was she not? She was proceeding in the damaged condition which I have already described with only the lower maintopsail set for something about two hours before the

(1) See ante, p. 121, n. (1).

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collision, and she was put into that condition with the object of getting her tug and getting safely into the Downs. The question is, was she at this time under command, or not under command from any accident. There is no doubt that her condition was due to the previous collision, which was an accident, and I have asked the Elder Brethren—it is a matter purely for them—whether she was under command or not. Their view is that the defendants' ship was, in the circumstances, not under command, having regard to all the conditions of the traffic and the action which she might be called upon to take—to act promptly and properly for other vessels. I understand by that, that although it would be possible for a vessel going as she was to alter her course slowly, or to take action in some way for the purpose of altering her course for a vessel which she might meet, and so get out of the way, she had not only one vessel to consider when she put up these lights. She had to consider the traffic in the Channel and all the vessels out of the way of which she might have to keep. I may add these observations. Either she would pay off very slowly indeed, or she might, if she tried to come up, come up very quickly, and then she would not be in a position, certainly not in the latter case, to act for other vessels. That is the answer to the first broad point in connection with the defendants' case. Then another point was made, namely, that she was proceeding negligently, having regard to the circumstances of the case, in reducing herself only to this sail that she had set at the time. I have asked the Elder Brethren a further question about this, and they advise me that the circumstances were not such as to justify the Court in holding that she was proceeding in an improper manner. There is positive evidence from the defendants' master and from the surveyor to the effect that she could not set her head sails, and it must not be forgotten that what she was doing was being done with the object of proceeding to the Thames, and she was, it seems to me, acting reasonably in endeavouring to take a tug to proceed into the Downs.

A further point was taken, namely, that if the defendant vessel says in effect, "Here I am, in a crippled condition and

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not under command," and exhibits "Not under command" signals, she should act accordingly, and leave other vessels to get out of the way; but the evidence is that she, some time before this collision actually happened, ported her helm. I have already said that I do not accept the view that they ported because of a position of lights such as they contend for, but they ported their helm to a green light. The Elder Brethren take the view, and I agree, that that was a material cause in bringing about this collision. The helm was ported, the vessel paid off, and I think but for that having taken place there was a great probability that the plaintiffs' ship would have got across the bows of the barque. My view, therefore, is that, having signalled that she was not under command and that the other vessel must act for her, she ought not to have acted in the way she did, but should have kept her course and let the brigantine get out of the way. She did not do so, and the result is that the *Hawthornbank* must be held alone to blame.

There is one other matter. As I have already said, the story told by those on the *Hawthornbank*, that they ported to a red light in order to give more room and to steer better, I do not accept as regards the light that was seen. I think the vessels were green to red. I think, therefore, that the look-out was defective on board the *Hawthornbank*, and that the pilot was not properly informed that there was a green light in sight, which light really must have been visible at the time the helm was ported. It seems to me that if that is so the *Hawthornbank* must be held alone to blame and her owners liable, because the look-out was defective—perhaps because they were looking after the tug and not paying sufficient attention to the navigation ahead. That disposes of the question of compulsory pilotage.

Solicitors for plaintiffs: *Lowless & Co.*
Solicitors for defendants: *Thomas Cooper & Co.*

T. L. M.

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Nov. 20.

Admiralty—Salvage—Value of Salved Vessel for purposes of Award.

A steam trawler, having fallen in with a disabled steam vessel in the North Sea, towed her to a position off Aberdeen; but as, in the heavy weather prevailing, the master of the trawler was unwilling to incur the risk, without a pilot, of taking a large disabled vessel into the harbour, signals were made for a pilot and a tug, in response to which a tug came out and offered to pilot and tow the disabled vessel in. The master of the disabled vessel declined to accept her services and, after some delay, the trawler was told to go ahead. The hawser parted, and the disabled vessel drove ashore, involving an expense of 1150*l.* to float her, and 5600*l.* for repairs. In an action of salvage brought by the owners, master, and crew of the trawler, it was contended by the owners of the disabled vessel that the award, if any, must be based, not on 8500*l.*, the value of the disabled vessel before she stranded, but on the amount she proved to be worth to them, namely, 1750*l.*:—

Held, by Gorell Barnes J., that the trawler had done all that could reasonably be expected of her, and was entitled to an award of 750*l.*, based on a valuation of 8500*l.*, that being the value of the disabled vessel at the time that she was brought within reach of the tug.

Action of Salvage.

The plaintiffs were the White Star Fishing Company, Limited, owners of the *Waago*, and her master and crew. The defendants were the owners of the *Germania*.

The case is reported on the question of the basis on which an award of salvage is to be made where the value of the salved vessel is greatly reduced after the services terminate, but before the vessel is finally placed in safety.

The material facts were shortly as follows:—

The *Waago*—a steam trawler of 155 tons gross register, with engines of 330 horse power effective and ten hands—was on December 3, 1902, homeward bound from the Faroe fishing grounds to Grimsby with about twenty tons of fish, and about 7.30 A.M., when some thirty miles E.S.E. of Girdleness Light in Aberdeen Bay—the tide being nearly low water, the wind blowing a gale from the south-east, with a high sea—a vessel was observed a few miles to the westward which proved to be the *Germania*, a German steamship of 2607 tons gross register,

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from Kratzwick to Newcastle-on-Tyne in water ballast. She had, the day before, lost her propeller owing to the breaking of her tail-end shaft, and, with two anchors down, and flying the distress signal N.C., was drifting to the north-westward.

The master of the *Germania* hailed the trawler that he wanted assistance, and, according to the finding of the Court, the master of the *Waago* agreed to render salvage services with the object of getting him to a place of safety. After failing to make fast at the first attempt, a manila hawser was passed between the vessels. This shortly parted; and in hauling it on board again the *Germania* struck the *Waago* on the quarter, and the hawser again parted. The third attempt was successful, and, about noon, towage commenced on a W.N.W. course for Aberdeen, then distant about twenty miles. About 5 P.M. Aberdeen Bay was reached, and the trawler held the steamer head to wind whilst flares were shewn for a pilot and a tug. A tug having come up, her master hailed that there was too much sea on the bar for a pilot boat to cross, and, after some discussion and bargaining, the tug left to fetch a pilot. Between 8 and 9 P.M. the master of the *Germania* hailed the *Waago* to slack away the warp in order to take in a portion which was chafed; but, in doing so, the *Germania* drifted to leeward, and, on the *Waago* being again hailed to go ahead, the hawser parted. The *Germania* dropped her anchor, and, though the *Waago* endeavoured again to make fast, the *Germania*, owing to the gale, dragged her anchor and drifted ashore, and had to be floated off at a cost of 1150*l.*, whilst the subsequent repairs, due to the stranding, entailed an expenditure of 5600*l.*

The value of the *Waago* was 5000*l.*, and of her cargo 450*l.*; but owing to the delay caused in rendering the salvage services the fish had deteriorated and only realized 254*l.* The value of the *Germania*, in her disabled condition at the time the services of the *Waago* terminated, was 8500*l.*

Aspinall, K.C., and *Lauriston Batten*, for the plaintiffs, the owners of the *Waago*, and her master and crew. The *Germania* was brought by the *Waago* from a position of

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great peril to a place of safety, and the master of the *Waago*, recognising the risk of attempting, without a pilot, to take so large a vessel as the *Germania* into Aberdeen Harbour, was quite willing to let the tug, which came out, get hold of her and complete the service. The master of the *Germania* was, however, unwilling to avail himself at once, as he should have done, of the services of the tug, and in ordering the *Waago* to slacken out the hawser he committed an unseamanlike mistake, with the unfortunate result that, after the hawser parted, the steamer's anchor was unable to hold her and she drifted ashore. No doubt large sums have been expended in salvage operations and in subsequent repairs; but it is submitted that the plaintiffs are not concerned with these items of expense. They are entitled to an award for the services rendered, based upon a valuation of 8500*l.*, the admitted value of the vessel before she stranded.

Laing, K.C., and *Stubbs*, for the defendants, the owners of the *Germania*. The plaintiffs are not entitled to any salvage reward. At the time the *Waago* came up, the *Germania* was in need of steam assistance; but she was in no immediate danger as the gale had considerably moderated. The parting of the hawsers and the collision were due to unskilful manœuvering on the part of those in charge of the *Waago*. On reaching Aberdeen Bay the *Germania* signalled for a pilot, not for a tug, and, when it was found that a pilot was not available, the *Waago* should have towed the *Germania* into Aberdeen Harbour instead of heaving-to and lying in the bay. The chafing of the hawser rendered it necessary to shorten it, and as, whilst that was being done, the *Germania* had drifted towards the shore, the *Waago* was hailed to tow, but did this so unskilfully that the hawser parted, and the *Germania* was obliged to anchor. The *Waago* then abandoned her in a position of considerable peril, with the result that, in the wind then prevailing, the *Germania* drove ashore, and sustained great damage.

Even assuming that those in charge of the *Waago* were not guilty of negligence, and treating the disastrous stranding of the *Germania* as a misfortune which overtook the vessel in the

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course of the attempted salvage by the *Waago*, still the time when the *Germania* was ultimately placed in safety must be looked at, so that the plaintiffs are not entitled to base their claim for salvage on a valuation of 8500*l.*, for the cost of the subsequent operations required to tow the *Germania* off, together with the repairs necessitated by the stranding, must first be deducted, reducing her value to what she actually proved to be worth to her owners, namely, 1750*l.*

Lauriston Batten, in reply. The services of the trawler terminated when the master of the *Germania* signalled for pilots and tugs—that is, when he signified his intention of employing others to complete the service, and, physically, the services terminated when, through no fault of the trawler, the hawser parted. Up to that time the trawler had done all that could reasonably be expected of her, and her owners, master, and crew are entitled to an award for the services actually rendered to the *Germania* based on the value of that vessel at the time the services terminated.

GORELL BARNES J. The question is whether any salvage is to be given in this case, and, if so, upon what basis. The plaintiffs contend that they ought to be treated as having brought into safety, at the time they finished their services, property of the value of 8500*l.*; whereas the defendants contend that there was no salvage at all, and that, in any event, the value of the *Germania* can only be taken at 1750*l.*, as 6750*l.* has to be deducted, made up of 5600*l.* the cost of repairs, and 1150*l.* the cost of the salvage operations to get her off.

The *Germania* had met with bad weather in which she had broken her tail-end shaft and lost her propeller. When she was found by the *Waago* she had two anchors down; but they did not prevent her drifting generally in a north-westerly direction. The *Waago* was asked to assist her; but there was some confusion as to the exact words used by the English master of the *Waago* and the German master of the *Germania* in connection with the arrangement made for the towage. It has, however, been practically agreed by counsel that the matter, so far as salvage is concerned, must be treated as an

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open arrangement—to render salvage services with the object of getting into a place of safety—and on that basis I propose to treat the case. The *Waago* was made fast to the *Germania* about mid-day on December 3, and started to tow her. It took her a long time—I think some four hours—to make fast, and afterwards the vessel was towed in the direction of Aberdeen. They appear to have reached Aberdeen Bay at about 5 o'clock, or a little later, in the afternoon; and so far matters went fairly well. It had been bad weather, with a strong wind and sea from the S.E., and I think—and the Elder Brethren agree—that if the vessel had not had assistance from towing she would have been in danger of going on the coast further to the northward than she did. When the vessels came near to Aberdeen, according to the master of the plaintiffs' vessel, a white flare was burnt for tugs and pilots, and I think it is fairly obvious that the master of the trawler is right in saying that he would not like to have taken such a large vessel as the *Germania*, by himself, into Aberdeen, but that he could take her where she would be in a position to get tugs; and I think his statement is correct that signals were made for tugs. In response, a tug came out and came alongside the *Germania*, and a conversation ensued between the two masters. The master of the tug said that he told the master of the *Germania* that he could not have a pilot, because it was too rough for a pilot to come out, but that he himself had a licence for Aberdeen for the tug and could take the *Germania* safely in, and get a pilot afterwards; that he could go ahead and the trawler, if wanted, might make fast astern, and the remuneration could be settled on shore. Then there was a discussion, according to his evidence, as to the price, but the master of the *Germania* said he would not give more than 10*l*. There the negotiations, such as they were, broke off, without anything further being done.

There is one point which it is material to mention here. The master of the tug said that it was not safe for the trawler alone to take the *Germania* in, and that he told the master of the *Germania* he must dismiss the trawler from ahead, but she could work astern. Now, the master of the *Germania* says that when he had this conversation he understood the master

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of the tug to say, "Clear out the trawler altogether; I will bring you into a safe place," and that he himself said to the master of the tug, "You had better let one of your men go on board the trawler and you can go astern, inside." Then he went on to say that the tug went to the trawler, but came back and "asked if I would pay him if he brought out a pilot. I said he had better bring two, and that I would pay him 6*l.* to 7*l.* He asked 200*l.* for going astern, and I offered him 10*l.*, and he laughed at that and went to the trawler." It seems to me that there may have been some confusion between what these men understood each other to say; but one thing I do not think is established by the defendants, and that is that any stipulation was made by the tug that the trawler should be absolutely dismissed. The general inference I draw is that there was bargaining going on and that the defendants' master had the offer of a tug; but that he seems to have thought that if he could obtain a pilot he could get in with the trawler, and probably would have to pay but a very little more for a tug astern. My view is that the trawler's master was right in saying that he would not like to take the big ship in alone, but would bring her to a place where she could get a tug, and that those in charge of the ship should have recognised that position and never have allowed the tug to go. The master of the *Germania* should have taken that tug, and then this disaster would not have happened. However, the two vessels remained out in this weather, and the hawser near the steamer began to chafe. Those on the steamer started to get it in, but could not, because it was weighted between the two vessels by a chain cable. The master of the trawler seems to have thought from their calling constantly to him to go astern that he must take the weight off somehow, and that there might be some risk in doing it, but that he must, as they were drifting nearer the shore, get a taut hawser between them. I have consulted the Elder Brethren about this, and they do not see that there is any ground for suggesting that the master of the trawler was doing anything wrong in the circumstances at all. Their view is that it was not his fault that the hawser parted and that this misfortune happened. I think the

evidence of the master of the trawler must be accepted, and that he tried to make fast again and could not. Unfortunately the steamer's anchor did not hold and she went ashore. What is the general result? It seems to me that the plaintiff trawler had done what she could to bring the defendant vessel into a place of safety, and that if the tug had been taken there would have been no difficulty. I regard it as a case in which there ought to be a salvage award made on the basis of the plaintiffs' vessel having assisted the *Germania* from where she was taken in tow to a place in Aberdeen Bay, close to Aberdeen. Looked at from that point of view, it is a case of towage, though for a very short time, of a very valuable character, because it was from a position where the vessel, if unassisted, would have been in danger of going ashore at a spot more northerly than Aberdeen to a place where she could get a tug. I have considered the case very carefully, with the assistance of the Elder Brethren, and I am of opinion that the plaintiffs are entitled, on a value of 8500*l.*, to an award of 750*l.*

Solicitors for plaintiffs: *Deacon, Gibson, Medcalf & Marriott, for Grange & Wintringham, Great Grimsby.*

Solicitors for defendants: *Stokes & Stokes.*

T. L. M.

1904
Jan. 22, 26.

In the Estate of MARY GOODRICH, Deceased. PAYNE *v.* BENNETT.

Evidence—Date of Birth—Register—Entry—Births and Deaths Registration Act, 1836 (6 & 7 *Will.* 4, *c.* 86).

A certified copy of an entry in a register of births made pursuant to the statute 6 & 7 Will. 4, c. 86, is evidence, not merely of the fact of birth before the date of registration, but of the actual date of birth.

In re Wintle, (1870) L. R. 9 Eq. 373, disapproved.

Interest Suit.

Mary Goodrich, of Shelland, near Stowmarket, in the county of Suffolk, died there on March 6, 1902, a widow and intestate.

On May 16, 1902, a grant of letters of administration was made to Ellen Bennett (the defendant), who stated that she was the natural and lawful daughter and only next of kin of the deceased.

The plaintiff, Abraham Payne, as the lawful nephew and one of the next of kin of the deceased, now claimed revocation of the grant of letters of administration in respect of the deceased's estate which had been obtained by the defendant, as aforesaid, upon her oath that she was the natural and lawful daughter and only next of kin of the deceased.

The statement of defence simply alleged that the defendant was the natural and lawful daughter and only next of kin of the deceased.

In the course of the plaintiff's case a certified copy of an entry in a register of births for the year 1844 was tendered and relied on as proving the date of the defendant's birth.

Arthur S. May, for the defendant. The document is inadmissible. Not only did the Act of William IV. not require the mother or any one else to give information as to the birth of a child, but registration had to be paid for, and was, therefore, a luxury. One of the reasons for passing the Births and Deaths Registration Act, 1874 (37 & 38 Vict. c. 88), was that out of every million births, two hundred thousand were said to

have escaped registration under the Act of William IV. (6 & 7 Will. 4, c. 86).

If the document is admissible, it can only be evidence of the fact of birth: 6 & 7 Will. 4, c. 86, s. 38; or, at most, of birth before the date of registration: *In re Wintle.* (1)

[JEUNE P. I am at a loss to follow Lord Romilly's decision. The section of the Act (s. 38) says that the certified copy is to be received as evidence "of the birth"—not, as Lord Romilly says, "of the fact of birth, and nothing more."]

If that is the view, it is necessary to cite some older authorities which were not pedigree cases. In *Wihen* v. *Law* (2) the question was as to the age of the defendant, and a certificate of his baptism was produced. Bayley J. held that it was not evidence of the date of birth or to prove the age of the party. In *Doe* d. *Wollaston* v. *Barnes* (3) Lord Denman C.J. had before him an examined copy of a register of marriages, which was tendered to prove the date of a certain marriage. But that certificate was made evidence by Act of Parliament. [He also referred to *Huntley* v. *Donovan* (4) and *Ryan* v. *Ring.* (5)]

Priestley, K.C., (*Sherrington* with him), for the plaintiff. The exact point here taken was raised in *Reg.* v. *Weaver.* (6)

JEUNE P. I think this certificate is evidence, and is evidence of its contents. It appears to me that an attempt has been made to put a great deal too limited a force upon the word "required" in s. 38 of the Act of 1874, and I repeat that I see no reason why the Act of Parliament should have limited it in that extraordinary way, because there is no ground for suggesting that information given under compulsion is more likely to be true than information furnished voluntarily. But it seems to me that the word "required" may very well cover all the cases of a person authorized under the Act to give information. In some cases, no doubt, it is given voluntarily,

(1) L. R. 9 Eq. 373.
(2) (1821) 3 Stark. 63; 23 R. R. 757.
(3) (1834) 1 Mood. & Rob. 386; 42 R. R. 809.
(4) (1850) 15 Q. B. 96, at p. 100.
(5) (1889) 25 L. R. (Ir.) 184.
(6) (1873) L. R. 2 C. C. 85.

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and sometimes it is given by request, and in some cases it has to be given by the word "required" in its narrower sense. Therefore, I feel no difficulty in holding that the certificate is evidence under the Act of 1874, and that it is evidence of its contents. Then, of what is it evidence? I think it is evidence of what the Act requires to be stated. Now, the Act "requires," in the limited sense of the word, that the date of birth shall be given, because it refers to Sched. A, given in the authorized form in the Act of 1836 (6 & 7 Will. 4, c. 86). Against that there is the decision of Lord Romilly in the case of *In re Wintle*. (1) I quite admit that Lord Romilly does draw a distinction between the evidence of the fact of the child's birth and the evidence of the actual date of its birth. But that decision of Lord Romilly, so far as I know, and so far as the ingenuity and great research of the learned counsel have been able to discover, has not any support in later authorities. On the contrary, the statement in the text-book (2), I think, shews that it was not carried further; and the case of *Reg.* v. *Weaver* (3), which was cited by Mr. Priestley—a criminal case in which the accused person would not have been found guilty unless the law clearly supported such a conviction—appears to me conclusive to shew that the certificate is evidence of its contents, and, among its contents, is the date of the birth. In fact, I always thought that this constituted the ordinary means of proving the date of a birth, and that, in the usual procedure in Courts of justice, it was so treated. Under these circumstances, I feel no hesitation in accepting the certificate as evidence of the date of the birth of the party in question.

[The case then proceeded, and in the result the Court found for the plaintiff, and revoked the letters of administration which had been granted to the defendant.]

Solicitors for plaintiff: *Aldridge, Thorn & Sherrington, for Gudgeons, Peecock & Prentice, Stowmarket.*

Solicitor for defendant: *T. E. Crocker.*

(1) L. R. 9 Eq. 373. (2) Taylor on Evidence, vol. ii. (9th ed.), 1775, n. (3) L. R. 2 C. C. 85.

H. D. G.

TOMALIN *v.* SMART.

1904
Jan. 28.

Probate—Practice—Costs—Rule 41 (*Contentious Rules*, 1862)—*Rules of the Supreme Court, Order* XXI., *r.* 18—*Suit for Revocation of Probate—Notice by Plaintiff to cross-examine.*

In construing Order XXI., r. 18, the principles which guided the old Ecclesiastical Courts, and afterwards the Probate Court, ought to be considered; and, following out those principles, a distinction is to be drawn between a party who seeks to call in and obtain revocation of probate, and a party who enters a caveat and takes the ordinary steps in opposing a will being admitted to proof.

A notice given under Order XXI., r. 18, by a plaintiff who claimed revocation of probate, *held* bad.

Beale v. *Beale*, (1874) L. R. 3 P. & M. 179, approved.

SUIT for revocation of probate.

The plaintiff, George Reynolds Tomalin, as the lawful husband of Alice Tomalin, deceased, claimed revocation of the probate granted in common form of a will dated January 28, 1903.

In his statement of claim the plaintiff alleged that the said will was not duly executed and that the deceased died intestate, the substance of the case being stated to be "that the said pretended last will was not signed or executed by the said Alice Tomalin in the presence of R. W. Henstice, one of the alleged attesting witnesses; that the said Alice Tomalin did not request the said R. W. Henstice to sign or subscribe his name to the said pretended will as an attesting witness; and, that the alleged attesting witness, John Groves, did not subscribe his name to the said pretended will in the presence of the said R. W. Henstice. The above are the only reasons why the plaintiff alleges, as in paragraph 3 of the statement of claim, that the said pretended will is not the will of the said Alice Tomalin."

The deceased died on February 11, 1903, in Guy's Hospital, and probate was actually issued eleven days thereafter.

The plaintiff had no opportunity to challenge the will before probate was granted.

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On May 16 the defendant delivered his defence and counter-claim, denying the allegations of undue execution, and formally propounding the will in solemn form.

On May 26 the plaintiff filed a reply and defence to counter-claim, joining issue as to the defence, and "in reply to the counter-claim" repeating the allegations in the statement of claim, and, moreover, denying that the deceased made her true last will, bearing the date January 28, 1903, and appointed the defendant executor.

With his reply and defence to counter-claim the plaintiff filed a notice as follows:—

"Take notice that the plaintiff merely insists upon the pretended will dated the 28th day of January, 1903, of Alice Tomalin being proved in solemn form of law, and only intends to cross-examine the witnesses produced in support of the said will propounded in the counter-claim, and gives this notice pursuant to Order XXI., r. 18, of the Rules of the Supreme Court."

This notice was returned by the defendant's solicitors on May 27, with a written intimation that they declined to accept it, "as the rule in question does not apply," and that if any endeavour should be made by the plaintiff to make use of it, the defendant would take objection to it.

Whitmore L. Richards, for the plaintiff. The notice is good. It was delivered along with the defence to counter-claim. A counter-claim is equivalent to an original claim. The words of the rule refer to a "party" giving the notice: the plaintiff is certainly a party.

[JEUNE P. I should have thought that clearly covered the case.]

This rule follows the words of the earlier rule (Rules and Orders, 1862, r. 41).

R. H. Pritchard, for the defendant. The plaintiff is in the position of plaintiff and not of defendant, because his action is brought to revoke a probate already granted; that makes all the difference: *Beale* v. *Beale* (1); *Leigh* v. *Green*. (2)

(1) L. R. 3 P. & M. 179. (2) [1892] P. 17.

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[JEUNE P. *Beale* v. *Beale* (1) does seem to be an authority for your contention.]

W. L. Richards, in reply. That case was distinguished by the Divisional Court (Butt P. and Jeune J.) in *Leigh* v. *Green*. (2) Moreover, *Beale* v. *Beale* (1) was not decided on the present rule, but on the old rule (C. B. 41). The Rules of the Supreme Court, 1883, were not in existence; but now, under them, a counter-claim is for all purposes a statement of claim, and, consequently, a defence to counter-claim is in the same position as a defence to a statement of claim. Counter-claims in probate actions do not differ in this respect from counter-claims in ordinary actions. How, therefore, can it be said that the plaintiff is not protected by the notice which he delivered?

Probate in common form might be rushed through in the absence of persons adversely affected, who might be out of the country and not be aware even of the death. Are such persons to be deprived of the protection which the rule is supposed to afford? In the report of *Spicer* v. *Spicer* (3) the rule (Order XXI., r. 18) is set out, shewing the alteration in italics; but the reporter was in error in printing the word "*defendant*." The word should be "*party*," and that clearly covers the case of the present plaintiff. In the old probate rule (C. B. 41) the word used was "plea"; in the present rule the word is "defence."

[JEUNE P. I am very much impressed with the practice in the Prerogative Court, which apparently drew a distinction between a person who opposed a will in the first instance and a person who attacked a will after probate was granted.]

The plaintiff in the present case was practically precluded from being in the position of defendant, and was forced into the position of plaintiff owing to probate having been rushed through in eleven days after the death.

JEUNE P. After the argument addressed to me by Mr. Pritchard, I realize the effect of the decision in *Beale* v.

(1) L. R. 3 P. & M. 179. (2) [1892] P. 17.
(3) [1899] P. 38.

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Beale (1), which illustrates the distinction drawn between a person who seeks to recall a probate and a person who merely opposes the granting of probate. I conceive the sense of that distinction to lie in the fact that a person ought to announce his opposition to a testamentary document at the earliest possible moment by entering a caveat, and in due course taking the usual and subsequent steps; and, in such circumstances, he can put the party setting up the will or codicil to proof in solemn form without much fear of being condemned in costs; because, although the former rule of practice has been modified, so as to give the Court a discretion as to costs, this modification does not affect the point that the safety, or comparative safety, from being condemned in costs is afforded in terms to a "party *opposing* a *will*." It does not say that the protection is afforded to a party opposing probate—that is, seeking to recall probate already granted. It is quite true that, under the Rules of the Supreme Court, which apply to probate actions, a counter-claim is to be treated like an original statement of claim; but where I am called upon to construe a rule which is admittedly a modification of a previous rule, it appears to me to be not unfair or improper to inquire what principles were held to apply under the earlier rule, and to hold that the same principles ought to be applied under the new or modified rule. If this be the correct view, then Order XXI., r. 18, applies only in the case of a party opposing a will which another party is seeking to prove in solemn form: it does not apply to the case of a party who asks for revocation of probate. The discretion conferred by the modified rule now in force leaves it open to the Court to say, in dealing with the question of costs, after trial, that the party in question has brought himself within the spirit, though he be not within the letter, of the rule. I shall deal with the question of costs at the end of this case as it may appear to me to be right.

[The case then proceeded. At the close of the defendant's case the plaintiff decided to call his client and one of the attesting witnesses, and, in the result, the Court found for

(1) L. R. 3 P. & M. 179.

the will, and ordered probate thereof to be delivered out to the defendant as executor. The plaintiff was condemned in costs.]

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TOMALIN v. SMART.

Solicitor for plaintiff: *H. Cubitt Ireland.*
Solicitors for defendant: *G. & W. Webb.*

H. D. G.

[DIVISIONAL COURT.]

WILLIAMS *v.* WILLIAMS.

1904
Feb. 2.

Condonation—Effect—Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 *Vict. c.* 39).

The effect of condonation of an offence which is specified as a ground of complaint within the terms of the Summary Jurisdiction (Married Women) Act, 1895, does not depend on the wording of any section of that Act, but on the common law.

Therefore, where a wife complained of desertion within the meaning of that Act, and, during an adjournment of the hearing of the summons, resumed cohabitation with her husband, and subsequently, but before the date appointed for the adjourned hearing, separated from him again and obtained an order for separation and an allowance for maintenance:—

Held, that the order must be discharged, as the condonation by voluntary resumption of cohabitation had blotted out the cause of complaint, and there was nothing for the justices to adjudicate upon at the date of the order.

THIS was an appeal by the husband, William Henry Williams, from an order dated October 28, 1903, and made by the justices sitting at the petty sessional court of the county borough of Salford, whereby the appellant was adjudged to have deserted his wife, and she was granted a separation, and 10*s.* per week for her maintenance was ordered to be paid by him.

It appeared that the parties were only married on May 16, 1903, and that the husband left his wife on August 3. She lodged her complaint on August 5, and on August 14, after hearing the evidence of the wife, the justices adjourned the hearing till October 28, in the hope that, in the meanwhile,

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the parties would adjust their differences and resume cohabitation. This they did, in fact, on August 29, and they lived together as man and wife until September 27, when, after some slight quarrel, they took to occupying separate beds, but remained under the same roof until the date fixed for the adjourned hearing, when the wife, unbeknown to the husband, went to the justices, stated that her husband had not "lived" with her for a month past, and obtained from them the order now appealed from.

The wife thereupon went straight back to her house and ordered her husband to leave, which he did.

On November 3 he applied to the justices to rescind the order on the ground that it was made without his knowledge, and that there was fresh evidence, namely, condonation, which should have been adduced.

The justices, however, held that his only remedy was by appeal to the Divisional Court. Hence the present appeal.

S. G. Lushington, for the appellant. The justices had no power to make the order after resumption of cohabitation. There was then nothing for them to adjudicate upon: the cause of complaint was gone. Sect. 7 of the Act provides that on resumption of cohabitation any order made under the Act is done away with.

[JEUNE P. Sect. 7 does not deal with the case of a person lodging a complaint and resuming cohabitation *before* the date of the order. Suppose there was undoubted desertion and then resumption of cohabitation before any summons was taken out, would the condonation be an answer to a complaint under the Act of 1895 in a Court of summary jurisdiction? It would be so in a matrimonial suit in this Court.

GORELL BARNES J. Your point is that there must be actual desertion at the date of the order.]

The Act does not, in terms, provide for such a case as this but it could not possibly have been intended by the Legislature that Courts of summary jurisdiction should exercise jurisdiction which this Court could not entertain. No decision can be cited, under the Act of 1895, which covers this point; but, put

in the broadest way, condonation must be an answer. At common law condonation has been held to be an answer: *Harris* v. *Morris*. (1) Suppose a man had been convicted of an assault upon his wife, and had served his sentence or been pardoned, and had then gone back and lived with his wife, it would be very hard and unjust if the matter could be brought up again against him.

[GORELL BARNES J. referred to *Haddon* v. *Haddon*. (2)]

Condonation is expressly recognised in the Act (s. 6) in the case of a wife guilty of adultery.

[JEUNE P. That was, no doubt, founded upon the common law view.]

The respondent (wife) was not represented upon this appeal.

JEUNE P. I am sorry we have not had the advantage of hearing anything that might be said on the other side. It is, however, as far as I can judge, quite impossible to conceive any argument that would afford an answer to that which has been addressed to us on behalf of the appellant.

It appears that there happened, during the adjournment of the summons, just what the justices contemplated and hoped for, namely, a resumption of cohabitation. What is the effect of that? It does not come exactly within the terms of s. 7 of the Act of 1895, because it took place during the course of the litigation and before the date of the order. The effect of the condonation was to put an end to the cause of complaint—not by virtue of the Act, but by force of law. The principle acted on by judges of this Court, and, in the Ecclesiastical Courts, by our predecessors, that the moment you find a resumption of cohabitation there is an end of any previous desertion, is founded on or has been recognised by the Courts of common law. It appears from the case of *Haddon* v. *Haddon* (2), which was referred to during the argument by Gorell Barnes J., that where there had been a conviction before a Court of

(1) (1801) 4 Esp. 41 (cited in Lushington on the Summary Jurisdiction (Married Women) Act, 1895, at p. 65).

(2) (1887) 18 Q. B. D. 778 (also cited in Lushington on the Summary Jurisdiction (Married Women) Act, 1895, at p. 81).

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The President.

summary jurisdiction under the Matrimonial Causes Act, 1878 (41 & 42 Vict. c. 19), which, be it noted in passing, contained a similar provision as to condonation as is to be found in the Act of 1895, and afterwards a resumption of cohabitation took place, it was held, by Hawkins and A. L. Smith JJ., that the wife could not, after she had again left her husband, enforce payment of sums of money under the order. In the course of his judgment in that case Hawkins J. (1) referred to the case of *Bateman* v. *Countess of Ross* (2), decided by Lord Eldon, who, speaking of the effect of a reconciliation of married persons after a separation, "held the general doctrine to be clear, that a reconciliation after a separation entirely did away with the effects of it," adding that "this rested upon the ground of public policy, as it must not be permitted to parties to make agreements for themselves, to hold good whenever they chose to live separate." And the learned judge (Hawkins J.) adds: "I am not aware that this general proposition has ever been dissented from." Which I believe to be the case, although the reason given by Lord Eldon is no doubt obsolete.

Under these circumstances, I have no hesitation in holding that the resumption of cohabitation during the adjournment of the summons in this case put an end to the cause of complaint, and that the power of the justices to make an order passed away altogether.

GORELL BARNES J. I should just like to point out that the last clause of s. 7 of the Act of 1895, which provides that "if any married woman upon whose application an order shall have been made under this Act, or the Acts mentioned in the schedule hereto, or either of them, shall voluntarily resume cohabitation with her husband . . . . such order shall, upon proof thereof, be discharged." That provision is really based on the principle that by resuming cohabitation the married woman condones and puts an end to the cause of complaint. Therefore, if it is shewn that the parties have voluntarily resumed

(1) 18 Q. B. D., at p. 781. (2) (1813) 1 Dow, 235; 14 R. R. 55.

cohabitation, that puts an end to any cause of complaint which the one party had or may have had against the other.

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Appeal allowed and order below discharged, with costs.

Solicitors: *Fielder, Le Riche & Co., for E. Desquesnes, Salford.*

H. D. G.

WYKE *v.* WYKE (THE KING'S PROCTOR SHEWING CAUSE).

1903 *Dec.* 11. 1904 *Jan.* 28.

Divorce—Wife's Suit—Decree Nisi—Intervention—Adultery of Petitioner—Discretional Bar—Matrimonial Causes Act, 1857 (20 & 21 *Vict. c.* 85), *s.* 31—*Decree rescinded and Petition dismissed.*

In order that the Court should exercise the discretion conferred by the 31st section of the Matrimonial Causes Act, 1857, in favour of a petitioner guilty of adultery, it is not enough that the petitioner's misconduct was more or less pardonable or capable of excuse, but the Court must find, as a fact, that the petitioner's misconduct was caused directly by the matrimonial offence or offences of the respondent.

Constantinidi v. *Constantinidi and Lance*, [1903] P. 246, distinguished.

THIS was a motion by the King's Proctor to rescind the decree nisi and dismiss the petition.

The facts, as found, are stated in the judgment.

Victor Russell, for the King's Proctor, submitted to the judgment of the Court.

Le Mesurier, for the petitioner, called his client, and relied on *Burdon* v. *Burdon* (*the Queen's Proctor shewing Cause*) (1), *Symons* v. *Symons* (2), *Constantinidi* v. *Constantinidi and Lance* (3), and *Coombs* v. *Coombs* (*the King's Proctor shewing Cause*). (4)

Cur. adv. vult.

Jan. 28. BUCKNILL J. In this case the wife is the petitioner, and she seeks to be divorced from her husband on the ground

(1) [1901] P. 52.
(2) [1897] P. 167.
(3) [1903] P. 246.
(4) W. N. (1903) 180.

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of his adultery and cruelty. The parties were married on October 28, 1891. There were three children born of the marriage, all of whom are alive: Lilian, born in March, 1893; Harold, born in 1895; and Ada Ethel, born in September, 1897.

The petitioner, in her petition which was filed in November, 1902, alleged frequent acts of cruelty by the respondent in 1893 down to 1899; also, that he committed incestuous adultery in January, 1899, up to October in that year; and that, so soon as the petitioner became aware of it, in September, 1899, she left him, and had not since returned to cohabitation with him. The petition came on for hearing before the President on April 21, 1903, when a decree nisi was pronounced. On October 14, 1903, the King's Proctor intervened, and, by his plea, alleged that the petitioner had often committed adultery with one William Earle, and had, on July 28, 1903, borne a child to him, and had, since May 4, 1903, been living with him as his wife.

To this plea there was no answer, and on December 11, 1903, the matter came before me on motion, when the petitioner gave evidence. Her story was that when she left her husband in September, 1899, she obtained a situation as a barmaid, and managed to save enough money to institute these divorce proceedings; that she afterwards fell ill, and was in hospital for a long time, leaving it shortly before her petition came on for hearing, and could not afterwards get another situation, and was unable to do any hard work in consequence of a bodily ailment, which incapacitated her. "Then" (to use her own words) "when this young gentleman asked me to go and live with him, it was the only thing left for me to do, as I had expended all my earnings, which I had saved up, on the decree, to get what I wanted, so that I could marry again." She also stated that this same man was the father of her child which was born in July, 1903.

Therefore, although she says she only went to live with him after the decree nisi, she committed adultery with him when she was earning her living as a barmaid, and whilst she says she was preparing her case for the divorce proceedings. On these facts, can I exercise the discretion given to me by the

31st section of the Matrimonial Causes Act, 1857, and pronounce a decree absolute dissolving the marriage notwithstanding the adultery of the petitioner?

In *McCord* v. *McCord, Ogle, and Coxon* (1) Sir James Hannen thus stated the position: "The instances in which the Court has pronounced a decree for dissolution of marriage, notwithstanding the adultery of the petitioner, are very rare. I am only aware of two cases, that of *Joseph* v. *Joseph and Wentzell* (2), where the petitioner had committed what may be called innocent adultery by marrying again in the mistaken belief that his wife was dead, and the case of *Coleman* v. *Coleman* (3), where it appeared to the Court that the petitioner had been compelled by her husband to prostitute herself." At page 241 of the report the President pointed out that whilst he would not say that under no circumstances would the Court grant relief to a guilty petitioner when he or she had been fully forgiven for an act of adultery, yet the Court would never act on a loose and unfettered discretion, as Lord Penzance had expressed it in *Morgan* v. *Morgan and Porter* (4), but always on some definite principle which would serve as a future guide.

That principle had been laid down by Lord Penzance in the same case to be that there must be some special circumstances attending the adultery of the petitioner, or special feature placing it in some category capable of distinct statement and recognition.

Twelve years afterwards, in *Story* v. *Story and O'Connor* (5), Sir James Hannen referred to his judgment in *McCord* v. *McCord, Ogle, and Coxon.* (1) He said: "I had occasion, as long ago as in 1875, to go very carefully into this question, examining the principles on which my predecessors had acted, and I endeavoured to lay down a guide for myself. I have acted in accordance with those principles ever since."

It was not until ten years after that case that it was decided, in terms, that misconduct of a petitioner, which in fact conduced directly to the subsequent adultery of the wife, might be

(1) (1875) L. R. 3 P. & M. 237.
(2) (1865) 34 L. J. (P. & M.) 96.
(3) (1866) L. R. 1 P. & M. 81.
(4) (1869) L. R. 1 P. & M. 644.
(5) (1887) 12 P. D. 196.

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taken into consideration as a ground for exercising the discretion given by the 31st section. I refer to *Symons* v. *Symons* (1), decided by the President (Sir F. H. Jeune). There, the wife was petitioner, and she obtained a decree nisi on the grounds of her husband's adultery and desertion. The Queen's Proctor intervened, alleging her adultery. It is not necessary to refer to the facts of that case; but I quote the language of Jeune P. (2) He said: "I have no doubt that the husband's adultery and cruelty before his desertion and his prolonged desertion were the *main causes* of the wife's adultery, and he was guilty therefore of misconduct conducing to her adultery. So far as I know, this has not yet been decided to be one of the circumstances on which the discretion to allow a divorce may be exercised." And he said, referring to the facts of that case (3): "On principle, there appear to me to be strong reasons for holding that such wilful neglect or misconduct by a husband should constitute matters, possibly not always conclusive, but fit to be taken into consideration in exercising the discretion whether a divorce shall be granted against him."

In that case the decree nisi was made absolute. That decision was followed by *Constantinidi* v. *Constantinidi and Lance*. (4) There, the husband was petitioner, and a decree nisi was granted. The President pointed out, during the arguments, that in *Symons* v. *Symons* (1) he found as a fact that the husband (the respondent) was actually responsible for and drove his wife to commit adultery; by which I understand that his misconduct conduced directly to her adultery. In his judgment, the President said that s. 31 conferred "a discretion on the Divorce Court, without imposing specifically any limitations or any direction with regard to its exercise."

Whilst accepting that dictum as binding, it seems to me that it goes farther than any previous authority on the subject. Each case must, of course, be determined according to its facts: no feeling of sympathy, as, for instance, on behalf of an ill-treated woman, as in this case, can be entertained; nor may I listen to the appeal that she made to me, that if she can

(1) [1897] P. 167.
(2) [1897] P. at p. 174.
(3) [1897] P. at p. 177.
(4) [1903] P. 246.

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obtain her divorce to-day, another man is ready to marry her and take her child. The only question is this: Was her misconduct caused directly by her husband's cruelty and adultery? It is not enough that I could find, using the language of Lord Penzance in *Morgan* v. *Morgan and Porter* (1), that her conduct was "more or less pardonable or capable of excuse." Perhaps it was to some extent, and, in a sense, her husband's misconduct conduced to that which she did three years after she left him, because, but for his cruelty to her and his adultery with her sister, she would probably be living with him now. Her leaving him was directly caused by his conduct; but, in my opinion, her subsequent adultery was not.

From October, 1899, to October or November, 1902, she led a respectable life, earning her living, and was, she says, saving money slowly so that she might take proceedings for divorce.

Then she met the man with whom she is now living, and by whom she had a child in July, 1903. How can it be truly said that her conduct then was directly caused by her husband's conduct before she left him?

In my opinion it is impossible so to decide, and my judgment must therefore be, and is, that the decree nisi be rescinded and the petition dismissed with costs.

Solicitors: *The King's Proctor; Nordon, De Frece & Benjamin, for William H. Quilliam, Liverpool.*

(1) L. R. 1 P. & M. 644.

H. D. G.

[DIVISIONAL COURT.]

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Admiralty—Ship—Bill of Lading—Discharge of Cargo—"As fast as Steamer can deliver or the Goods will be landed"—Deficiency of Wagons—Liability of Consignee for Delay—Option of Shipowner as to Remedy.

In an action by shipowner against receivers of cargo for damages for detention of his vessel, a county court judge gave judgment in favour of the receivers of the cargo on the ground that the stipulation in the bill of lading that the goods were "to be taken from the ship by the consignees at their expense immediately after arrival, and as fast as steamer can deliver or the same will be transhipped into lighters, or landed, or warehoused at the expense and risk of the proprietors of such goods," divested the shipowner of any other remedy than that of landing or lightering the goods:—

Held, by the Divisional Court (Jeune P. and Gorell Barnes J.), reversing the decision of the Court below, that the shipowner had an option, so that he was not deprived of his ordinary remedy by not exercising the power of landing or lightering the goods; and, further, that the shipowner was entitled to judgment, as the receivers of the cargo had failed to shew that they had done their best in the actual circumstances to make the appliances of the port available.

APPEAL by plaintiffs, Gebruder van Uden, of Rotterdam, time charterers, and J. Roebe, master of the steamship *Arne*, in an action to recover the sum of 51*l.* 5*s.*, damages for the detention of the steamship, against a decision of the judge of the Swansea County Court in favour of the defendants, W. Gilbertson & Co., Limited, indorsees of bills of lading and consignees of the cargo.

The material facts were shortly as follows: Under a bill of lading dated April 6, 1903, about 1078 tons of pig iron and about 28 tons of old rails, making in all about 1106 tons, were shipped by one J. van Hemelryck on board the steamship *Arne* at Antwerp for Swansea, and, under a bill of lading dated April 28, about 910 tons of pig iron were shipped for a subsequent voyage. Both bills of lading were to the order or assigns of the shipper, and contained the following stipulations:—

"The goods to be taken from the ship by the consignees (at

their expense) immediately after arrival and as fast as steamer can deliver, or the same will be transhipped into lighters, or landed, or warehoused at the expense and risk of the proprietors of such goods."

"All goods consigned to 'order' will be delivered upon the quay, or into lighters, or warehoused at the option of the agents of the steamer, such delivery to be for account and risk of owners of the goods."

According to the admission of facts the respondents (defendants) commenced to take delivery of the consignment of goods comprised in the first bill of lading at 9 A.M. on Tuesday, April 14, but did not complete taking delivery until 12.30 P.M. on Saturday, April 18, or 99½ hours, and it was contended on behalf of the appellants (plaintiffs) that a reasonable time for taking delivery expired at or about noon on Thursday, April 16.

On the second voyage the respondents commenced to take delivery of the goods comprised in the second bill of lading at 7.45 A.M. on Monday, May 4, and completed taking delivery at 10 P.M. on Thursday, May 7, or 86½ hours, and it was contended by the appellants that a reasonable time for taking delivery expired at or about noon on Wednesday, May 6.

By the particulars delivered in the Court below the plaintiffs claimed damages for detention—on the first voyage, two days at 15*l.* per day, 30*l.*; and on the second voyage, one day ten hours at 15*l.* per day, 21*l.* 5*s.*—total 51*l.* 5*s.*; but, on the hearing of the appeal, the claim per day was reduced—in accordance with the evidence in the Court below—to 12*l.*, making 24*l.* and 17*l.* respectively, or a total of 41*l.*

According to the evidence of the plaintiffs the vessels could deliver about 500 tons per day, and they alleged that the delay in the discharge of both consignments was due to the defendants not taking proper steps to see that sufficient railway wagons were provided.

According to the evidence of the defendants, based on alleged averages in the case of previous steamers, a reasonable amount to discharge per day would be from 250 to 300 tons.

The learned county court judge gave judgment for the defendants, with costs, in the following terms: "I consider

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that the defendants are entitled to judgment on the construction of the clause in the bill of lading."

Feb. 3. The plaintiffs now moved the Court by way of appeal to set aside the judgment of the learned county court judge, and direct judgment to be entered for the plaintiffs, or, in the alternative, for a new trial, on the ground that the learned judge was wrong in law in holding "that no action could be maintained against the defendants for breach of the provision in the bills of lading . . . . to take delivery immediately after the steamer's arrival and as fast as steamer could deliver"; and "that on the construction of the bills of lading the plaintiffs had no other remedy for delay in taking delivery or detention of their steamer except that of transhipping the goods into lighters, or warehousing them at the expense and risk of the proprietors thereof."

Meager, for the appellants (plaintiffs). The respondents (defendants) did not on either occasion take delivery of the goods immediately after the arrival of the steamer or as fast as the steamer could deliver or within a reasonable time, and the clause in the bill of lading enabled the shipowner to land the goods, but did not bind him to exercise that power. It is a clause for the shipowner's protection, and his omission to make use of it is no answer to a claim for detention of the vessel: see per Lindley L.J. at p. 632 of *Hick* v. *Rodocanachi*. (1) The master has an option, and express words would be required to relieve the consignee from his liability for not receiving the goods. The evidence is that the ship could deliver 500 tons per day, and the consignee should have provided sufficient trucks.

[The case of *Modesto Pineiro & Co.* v. *Dupre* (2) was referred to.]

Balloch, for the respondents (defendants). The true test of diligence on the part of the defendants being: what is reasonable, having regard to customary methods and existing facilities, and the customary method of discharge being, in this case,

(1) [1891] 2 Q. B. 626; affirmed sub nom. *Hick* v. *Raymond*, [1893] A. C. 22.
(2) (1902) 9 Asp. M. L. C. 297.

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into railway trucks, the ruling of the learned county court judge, as to the construction to be put on the clause in question, may be supported, for, if there was no unreasonable delay, the shipowner had no cause of complaint, and, if he had any cause of complaint, he could, by exercising the power given him by the bill of lading, compel the receiver of the cargo to take delivery in another way. In other words, assuming that the vessel could deliver 500 tons a day, that is not the test of the obligation as to taking delivery resting on the defendants, for the ordinary facilities of the port which consist of delivery into railway trucks do not allow of discharge at that rate, the customary discharge, according to the evidence, not exceeding 250 to 300 tons a day; and this discharge is dependent on the supply of trucks by the railway company, over whom the defendants could not exercise any effective control.

The expression that the discharge shall take place "as fast as steamer can deliver" only means that delivery shall be taken by the consignee as fast as the ship working reasonably can give delivery, under the conditions and with the means available at the place of delivery: *Wyllie* v. *Harrison*. (1) In that case the ship was delayed by the want of railway trucks, which was the customary mode of discharge. The only trucks permitted were, as in the present case, those of certain railway companies, and it was customary for consignees to notify one or other of those companies that trucks were required, and for that company to provide trucks according to its ability. The Lord Justice-Clerk (Moncreiff) said: "The place of delivery may be a port which is subject to regulations which are not within the powers of the charterer, and which must be complied with before delivery can be given at all. Where these regulations, which are incorporated into the charterparty, provide that goods shall not be laid down on the quay, but put into trucks, I think the whole obligation of delivery is subject to the possible contingency of trucks being available." This decision was approved by the Court of Appeal in *Good* v. *Isaacs* (2), the effect of which is to shew that there is no

(1) (1885) 23 S. L. R. 62; 13 R. 92. See Carver's Carriage by Sea, 3rd ed. s. 619a.

(2) [1892] 2 Q. B. 555.

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warranty on the part of the indorsee of the bill of lading that the customary appliances will be available for discharging the ship immediately. The Scottish case was also approved in *Hulthen* v. *Stewart* (1), where Lord Macnaghten says: "It is I think established that, in order to make a charterer unconditionally liable, it is not enough to stipulate that the cargo is to be discharged 'with all despatch' or as 'fast as steamer can deliver,' or to use expressions of that sort. In order to impose such a liability the language used must in plain and unambiguous terms define and specify the period of time within which delivery of the cargo is to be accomplished." In that case the words "according to the custom of the port" were included; but that is not material, for in *Postlethwaite* v. *Freeland* (2) the words were, "the cargo to be discharged with all despatch according to the custom of the port"; and Lord Blackburn said: "the express reference to the custom of the port of discharge is no more than would be implied." This passage is quoted in the judgment in *The Jaederen* (3), where the words were, "steamer to be discharged as fast as she can deliver"—that is, there was no express reference to the custom of the port, but that custom was imported into the contract, with the result that the plaintiffs failed, as it is submitted they have done in this case, to make out any breach of the contract to discharge as fast as the ship could deliver.

In *Lyle Shipping Co.* v. *Cardiff Corporation* (4) the custom proved was, as here, to discharge into the wagons of certain railways that had access to the quay, and it was held that the charterers, having done their best to procure the appliances that were customarily used at the port for discharging such a ship, and having used them with proper despatch, were not liable for the delay which arose from an insufficiency of trucks, and, as they would be implied, it was immaterial whether the words "as customary" were used or not: see, at p. 643, the judgment of A. L. Smith L.J. In other words, in the absence of a fixed period of time specified in the bill of lading, all that the consignee is bound to do is to use

(1) [1903] A. C. 389, at p. 394.
(2) (1880) 5 App. Cas. 599, at p. 613.
(3) [1892] P. 351.
(4) [1900] 2 Q. B. 638.

reasonable diligence in the circumstances in which he is placed, the result being that if this Court should hold that the ruling of the learned judge was wrong in law on the question of the construction to be placed on the clause in the bill of lading as to landing or lightering the goods, and should also not be satisfied on the question of fact as to the alleged want of diligence on the part of the defendants—that is to say, whether the defendants made proper use of the reasonable facilities of the port, then that would be ground for sending the case down for a new trial with a view to ascertain the damages, if any.

Meager, in reply. As the defendants have practically given up the ruling of the learned county court judge in their favour, the case resolves itself into the question of fact whether delivery of the cargo was taken within a time which was reasonable under the existing circumstances, and it is submitted that the defendants have failed to discharge the burden of proof, as it lies upon them to shew that the delay in procuring wagons was not caused or contributed to by them—that is to say, the defendants have not satisfied the Court that, with the customary appliances of the port, they could not have given the vessel quicker despatch. It is further submitted that the plaintiffs have given sufficient proof of the quantum of damage.

[The case of *Metcalfe* v. *Thompson* (1) was referred to.]

THE PRESIDENT (SIR F. H. JEUNE). I thought at first that we had not the materials before us for deciding the whole of the case; but, on considering the matter carefully, it seems to me that we are in a position to deal with it as it stands. I have no doubt that the learned judge's decision was based on the view that on the true construction of the bill of lading the shipowners had their remedy, and their sole remedy, in the power to land the goods on the quay or in lighters if they were not taken away by the consignees. In addition to the words "I consider that the defendants are entitled to judgment on the construction of the clause in the bill of lading," the learned

(1) (1902) 18 Times L. R. 706.

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judge says that counsel for the plaintiffs contends that that condition was optional, shewing that what he based his decision on was, not that there was no right of action in the case, but that the sole remedy for a breach of the condition as to taking delivery was in the terms provided by the bill of lading.

I am unable to agree with the learned judge that that view is correct. It seems to me clear that the words in the bill of lading do not take away the ordinary right of bringing an action if the terms of the bill of lading are departed from. It seems to me that it would be unreasonable to say that the landing of these goods was the sole remedy. Supposing the sole cause of the non-delivery was that the trucks were not ready, it would be hard to throw upon the master the responsibility of saying that the delay was so great that he could not allow it to continue; and, on the other hand, if the trucks could not be supplied by the railway company, I am by no means sure that the hardship would not be on the consignees of the goods.

It would be far more reasonable to say that the ordinary remedy of the shipowner remained the same, but that he had an alternative option which he could have exercised. In this case he does not seem to have exercised it, and I do not think the learned judge was right in holding that that debarred him from bringing an action to enforce his ordinary rights under the bill of lading. Then comes the question whether or not we are able under the circumstances to enter judgment for the plaintiffs. I think we are, because what is said now is that judgment ought not to be entered for the plaintiffs because there is some defence which the defendants either have set up or might have set up. I do not know that they might not possibly have raised in the Court below a defence other than that which they have raised; but in the Court below they did raise the defence as to the non-supply of trucks by the railway company, and clearly also raised a further defence, namely, that they were justified in taking the average quantity of goods discharged per day of similar cargoes as a test of their own obligations under the bill of lading, and I think it is too

late for them now to come forward and say that a totally different defence might have been raised. It appears to me clear that no such defence ought to be successful. The plaintiffs shewed, without contradiction, what the capacity of their steamer was, and then it was shewn further that the delay arose from the dearth of wagons. That, I think, made out a primâ facie case in favour of the plaintiffs. It may well be that the obligation of the consignee was to take delivery as fast as the steamer could deliver, having regard to the mode of delivery and the state of the appliances with which delivery could be taken; but then if their answer was that they had done all they could, and that the delay arose from no default on their part, and that they did everything on their part, then they ought to have shewn that. It was upon them to do so. But the moment the plaintiff shewed that but for the want of wagons they could have delivered at a certain rate, then, if the defendants could have shewn that by no fault of theirs, but by the fault of other people, such as the want of railway trucks, the delay was caused, it would have been a different matter; but they did not attempt to shew that.

I do not agree that the question of average quantity was material here, though in taking into consideration what the steamer could do, you have to consider the actual state of things—the appliances of the port, and the mode of delivery; still, that does not relieve the defendants from their liability to shew that they have done all they could, and that it was not their fault. A primâ facie case is made out against them, and there is no answer either set up, or which to my mind can be set up, to meet the case of the plaintiffs. In these circumstances I am prepared to give judgment for the plaintiffs. The figures work out at 41*l.* as the amount, on the plaintiffs' evidence, which they are entitled to recover. I think, therefore, the proper course will be to reverse the judgment of the Court below, and give judgment for the plaintiffs.

GORELL BARNES J. I agree with the learned President as to the construction of the bill of lading, and also, on the facts, I think with him that the plaintiffs made a primâ facie case of

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non-acceptance or non-taking of delivery from the ship by the consignees, immediately after arrival, as fast as steamer can deliver, whether the words "as customary" are implied or omitted. They made a primâ facie case that they were ready to deliver, and to deliver easily at a rate which they say could have been exceeded. No answer is made to that by the defendants upon the facts. No explanation is given, and there is nothing to shew that they could not have discharged the ship as fast as customary, assuming those words to be inserted in the bill of lading. All that they have done is to attempt to set up a case of delivery of average quantities of similar cargoes, the contracts respecting which are not dealt with in the evidence before us, and there is an attempt to make out a case of a fair and reasonable amount. They do not seem to have answered the primâ facie case made out by the plaintiffs; and, therefore, I agree that there should be judgment for the plaintiffs.

Appeal allowed with costs here and below. Judgment for plaintiffs for 41*l. Leave to appeal refused.*

Solicitors for appellants: *Spencer Chapman & Co., for John R. Richards, Swansea.*

Solicitors for respondents: *Botterell & Roche, for William Cox, Swansea.*

T. L. M.

[IN THE COURT OF APPEAL.]

C. A.
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Feb. 18, 23.

GORDON *v.* GORDON AND GORDON (CO-RESPONDENT).

Divorce — Practice — Contempt — Person in Contempt—Right of Hearing—Married Woman—Separate Estate—Restraint on Anticipation—Power to order Payment of Costs — "Proceeding instituted"—Married Women's Property Act, 1893 (56 & 57 *Vict. c.* 63), *s.* 2.

Applied. HADKINSON *v.* HADKINSON [1952] P. 285

The general rule that a person who is in contempt cannot be heard to make any application to the Court applies primâ facie to voluntary applications by him—i.e., when he comes to the Court asking for something.

The rule does not prevent a person who is in contempt from appealing against an order, made after the contempt was committed, on the ground that the order was made without jurisdiction.

Per Cozens-Hardy L.J.: Whether for this purpose there is in principle any sound distinction between contempt committed before and contempt committed after the order which the person in contempt seeks to challenge, *quære*.

The decree nisi for the dissolution of a marriage on the ground of the wife's adultery directed that the child of the marriage should remain in the custody of the husband until further order, and should not be removed out of the jurisdiction without the sanction of the Court. At that time the child was with the wife out of England, and on the same day an order was made ex parte in chambers that the child should be forthwith delivered up to the husband, and should remain in his custody until further order. After the decree nisi had been made absolute the wife, who had in the meantime married the co-respondent, came to England with the child. She then took out a summons asking that the decree nisi and the ex parte order might be varied by entrusting the custody of the child to herself. Pending the hearing of this summons the wife by her counsel gave an undertaking not to remove the child out of the jurisdiction without the consent of the Court. On March 10, 1903, the President ordered that the summons be dismissed and that the wife should pay the husband's costs, those costs to be payable out of her separate property, notwithstanding that it was subject to a restraint on anticipation. It was further ordered that the child should be forthwith delivered up by the wife to the husband, and should remain in his custody until further order.

Immediately after this order was made it was found that the wife had sent the child out of England two or three days previously, and had herself followed on the day on which the order was made. She had since remained out of the jurisdiction with the child. On March 12 the President pronounced the wife in contempt for breach of her undertaking, and ordered her to be attached for her contempt, and another order was made the same day for her committal for her contempt in non-compliance

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with the ex parte order that the child be not removed out of the jurisdiction. On May 12 the wife gave notice of appeal from so much of the order of March 10 as directed the payment of costs out of her separate property, notwithstanding that it was subject to a restraint on anticipation. It was alleged that under the circumstances the Court had no jurisdiction under s. 2 of the Married Women's Property Act, 1893, to make the order as to the payment of the costs:—

Held, that, notwithstanding her contempt, the appellant was entitled to be heard:

Held, also, that the summons was not a "proceeding instituted by" the wife, within the meaning of s. 2 of the Married Women's Property Act, 1893, but was a step in the divorce suit, and that consequently there was no jurisdiction under that section to make an order for payment of costs out of the separate property subject to a restraint on anticipation.

The order was accordingly discharged.

APPEAL against an order of the President (Sir F. Jeune) directing the payment of costs out of the separate property of Margaret Gordon notwithstanding that it was subject to a restraint on anticipation.

The petition was presented by C. F. Gordon for the dissolution of his marriage with Margaret Gordon on account of her adultery with the co-respondent.

On November 25, 1901, a decree nisi was pronounced for the dissolution of the marriage, and it was ordered that the only child of the marriage "do remain in the custody of the petitioner until further order of the Court; but it is directed that such child be not removed out of the jurisdiction of the Court without its sanction."

The child was in fact not then in the custody of the petitioner, but was with the respondent, who was out of England. On the same day an order was made ex parte in chambers directing that the child should be "forthwith delivered up and do remain in the custody of the petitioner until further order of the Court."

On June 2, 1902, the decree nisi was made absolute.

In August, 1902, the respondent married the co-respondent.

In October, 1902, she returned to England, and was then for the first time served personally with the orders relating to the custody of the child.

On October 15, 1902, the respondent took out a summons entitled in the suit calling on the petitioner to shew cause why so

much of the decree nisi as ordered that the child should remain in the custody of the petitioner until further order of the Court, and the order of November 25, 1901, should not be varied, and in lieu thereof that the custody of the child be entrusted to the respondent.

This summons was heard by the President in February and March, 1903. In the course of the hearing the respondent by her counsel gave an undertaking not to remove the child out of the jurisdiction without the consent of the Court.

On March 10, 1903, the President ordered (1) that the summons be dismissed, and that the respondent "do pay to the petitioner his costs of and incident to the said summons, such costs to be payable out of the respondent's separate property, notwithstanding that such property is subject to a restraint on anticipation"; and it was further ordered that the child "be forthwith delivered up by the respondent to the petitioner, and do remain in the custody of the petitioner until further order of the Court; but it is directed that such child be not removed out of the jurisdiction of the Court without its sanction." The order was entitled in the divorce suit. On the petitioner attempting to serve the order it was found that the respondent had gone away with the child.

On March 12, 1903, the President made an order (2) pronouncing "the respondent to be contumacious and in contempt for breach of and non-compliance with her undertaking, given through her counsel . . . . not to take the child out of London," and it was ordered that "the respondent be attached for such contempt.

On the same day another order was made that the respondent do stand committed to Holloway Prison for her contempt in non-compliance with the order of November 25, 1901, that the child be not removed out of the jurisdiction of the Court without its sanction. On the next day a writ of attachment was issued against the respondent, and a warrant was granted for her arrest.

She had not been arrested because she remained abroad with the child.

(1) [1903] P. 141. (2) [1903] P. 143.

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On May 12, 1903, she gave notice of appeal against so much of the order of March 10, 1903, as directed the payment of costs out of her separate property notwithstanding that it was subject to a restraint on anticipation.

In opposition to the appeal an affidavit was made by Sir George Lewis, the petitioner's solicitor, in which he said: "Notwithstanding the undertaking of the respondent not to remove the said child out of the jurisdiction of the Court and in defiance thereof, the respondent two or three days before the decision of the Court surreptitiously sent the child out of the country, and on the day the Court gave judgment she herself left England, and she has since remained abroad with the said child, and has been joined by the co-respondent, and they are living abroad with the said child."

This affidavit was not contradicted.

Bargrave Deane, K.C., and *Methold*, for the respondent.

Duke, K.C., and *Priestley, K.C.*, for the petitioner, took the preliminary objection that the respondent being in contempt could not be heard to make any application to the Court until she had purged her contempt.

Bargrave Deane, K.C., and *Methold*, for the respondent. A person who is in contempt is not precluded from defending himself against an order which has been improperly made, though he cannot while in contempt be heard to make an application of his own. It is contended that the order for payment of costs was not within the jurisdiction conferred by s. 2 of the Married Women's Property Act, 1893. The objection is to the jurisdiction of the Court. That a person in contempt may be heard by way of defence against an irregular order is shewn by *King* v. *Bryant* (1); *Wilson* v. *Bates*. (2) The Court will not refuse to set aside an order based on a mistake of law.

[VAUGHAN WILLIAMS L.J. If a person who is summoned as a witness refuses to attend, and an order is made for his arrest to compel his attendance, he cannot appeal against the order for his examination until he attends in Court.]

That would be a merely personal matter, and is entirely

(1) (1838) 3 My. & Cr. 191. (2) (1838) 3 My. & Cr. 197; 45 R. R. 254.

different from a question between parties. In *Fry* v. *Ernest* (1) it was held that a defendant, though in contempt, was at liberty, without purging his contempt, to take every step necessary for his defence.

It is submitted that the rule is well settled that a person who is in contempt may not initiate proceedings of his own, but he may defend himself against an irregular order. And he may appeal from the order which places him in contempt. Here it is said that that part of the order of March 10 which directed payment of the costs out of the wife's property subject to a restraint on anticipation was irregular and made without jurisdiction. A number of cases as to the right of a person who is in contempt to be heard are collected in a note to *Chuck* v. *Cremer* (2), such as *Green* v. *Green* (3); *Barker* v. *Dawson* (4); *Parry* v. *Perryman* (5); *Ricketts* v. *Morningston* (6); *In re Brady* (7); *Hawkins* v. *Hall* (8); *Anon.* v. *Lord Gort* (9); *Morrison* v. *Morrison.* (10) These cases, it is contended, establish that the rule is as above stated. In *Barker* v. *Dawson* (4) Lord Cottenham said that "there was a wide distinction between a case where the order alleged to be irregular was obtained prior to the contempt, and where it was obtained subsequent to the contempt." In the former case, he said, the contempt must be purged before the party could make any application to the Court. "But he never would extend the rule to a case where the order, sought to be set aside on the ground of irregularity, was made subsequently to the contempt. Such an extension of the rule would place the party in contempt too much at the mercy of his adversary." In the present case the uncontradicted affidavit of Sir G. Lewis shews that the contempt was committed two or three days before the order appealed from was made.

Other authorities on the point are *Plumbe* v. *Plumbe* (11);

(1) (1863) 12 W. R. 97.
(2) (1846) 1 Coop. temp. Cott. 205 et seq.
(3) (1828) 2 Sim. 394.
(4) (1836) 1 Coop. 207.
(5) (1838) 1 Coop. 207.
(6) (1834) 7 Sim. 200; 40 R. R. 107.
(7) (1828) 1 Mol. 254.
(8) (1838) 1 Beav. 73.
(9) (1823) 1 Hog. 77.
(10) (1844) 4 Hare, 590.
(11) (1839) 3 Y. & C. Ex. 622.

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Ex parte Chadwick (1); *Chatterton* v. *Thomas* (2); *Futvoye* v. *Kennard* (3); *Cattell* v. *Simons.* (4)

If necessary it will be submitted that there is no sound distinction between an order made before and an order made after the contempt.

It will be contended that this order is invalid, but so long as it stands the trustees of the settlement cannot safely pay the income to the appellant. The order has the effect of an injunction restraining the trustees from paying the income to her, and it would not be right to punish her for her contempt in that way.

Duke, *K.C.*, and *Priestley*, *K.C.*, for the petitioner. No case has been cited which shews that a person who is in contempt with respect to a particular order can while in contempt contest that order.

[VAUGHAN WILLIAMS L.J. referred to *Barnardo* v. *Ford.* (5)]

Wilson v. *Bates* (6) does not lay down that a person who is in contempt can proceed with any step in the cause. Contempt outside the particular proceeding cannot be relied on as a bar. If you bring a man into Court you cannot say he shall not be heard in his defence. That is the effect of *King* v. *Bryant.* (7) *Wilson* v. *Bates* (6) did not deal with any general principle. It did not touch the general rule that a person who is in contempt cannot proceed in a matter immediately connected with the contempt: *Chuck* v. *Cremer.* (8) The general rule is that a litigant who is in contempt is not allowed to take any step of his own in the action or cause in which the contempt has been committed: *Garstin* v. *Garstin* (9); *Cavendish* v. *Cavendish.* (10) It is submitted that the present case does not fall within any of the recognised exemptions from the general rule that a person who is in contempt will not be heard until he has purged his contempt. It is not alleged that the Court had no jurisdiction to make such an order for the

(1) (1850) 15 Jur. 597.
(2) (1867) 36 L. J. (Ch.) 592.
(3) (1859) 2 Giff. 110.
(4) (1843) 5 Beav. 396.
(5) [1892] A. C. 326.
(6) 3 My. & Cr. 197; 45 R. R. 254.
(7) 3 My. & Cr. 191.
(8) 1 Coop. 205.
(9) (1865) 4 Sw. & Tr. 73.
(10) (1866) 15 W. R. 182.

payment of costs ; it is only said that under the circumstances such an order ought not to have been made. That is not really a question of jurisdiction.

[VAUGHAN WILLIAMS L.J. referred to *Ex parte Fernandez*. (1)]

That was a proceeding by way of habeas corpus, not an appeal. The right to challenge an order for informality is independent of the right of a party to a suit who is in contempt to take proceedings in the suit. It is not contended that if an order was clearly made without jurisdiction an appeal from it could not be heard if the appellant was in contempt. But that is not the present case. And, if an attempt were made to enforce this order, the objection that it is a bad order could then be raised either by the wife or by the trustees. Moreover, in fact, when the order for payment of costs was made no objection was raised to it ; it was treated as a matter of course. This objection that the appellant is in contempt may be the only mode of enforcing the order for the delivery up of the child, and the Court will not readily assist her to the detriment of the petitioner in her disobedience to its own order. Though there is in the order of March 12 no express adjudication of contempt in disobedience to the order of March 10, yet it is shewn that that order has been disobeyed, and the contempt was continuing when the notice of appeal was given.

[COZENS-HARDY L.J. Is there in principle any distinction between contempt before and contempt after the order appealed from ?]

Lord Cottenham expressly laid down the distinction. The general rule is that a person who is in contempt cannot be heard. This was founded on the 78th of Lord Bacon's Ordinances of January, 1618. (2) Since then various exceptions have been admitted, gradually enlarging the right of a person who is in contempt to be heard.

[VAUGHAN WILLIAMS L.J. I think that, independently of any authority, any one affected by an order made without jurisdiction must be entitled to complain of it.]

(1) (1861) 10 C. B. (N.S.) 3. (2) Vide 1 Coop. temp. Cott. 208.

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In *Garstin* v. *Garstin* (1) and in *Cavendish* v. *Cavendish* (2) there had been no adjudication of contempt, but the contempt was brought to the notice of the Court, and the Court refused to hear the person who was in contempt. In *Curtis* v. *Curtis* (3) Lord Brougham said: "It is a general rule of all Courts that no party shall be allowed to take active proceedings if in contempt. It appears to us not merely the right of the party to object to the admission of this defensive allegation, but it is the right of the Court. The Court has a right to say that it will not allow a process issuing out of the Court to be treated with contempt." In *In re Brady* (4) the objection that the applicant was in contempt was overruled on the ground that the general rule did not apply to interlocutory proceedings. In *Howard* v. *Newman* (5) Sir A. Hart L.C. said: "By a rule of the Court, to which there is but one exception, a party in contempt cannot move, and the exception is, if he contests the regularity of the process or service by which he is in contempt." The Chancery cases only shew that certain steps in a suit could be enforced in a particular way, and they are reconciled by what Lord Cottenham said in *Wilson* v. *Bates*. (6) There is a distinction between an order which is bad on the face of it, and one which may or may not be bad according to the circumstances under which it was made. In Lord Chief Baron Gilbert's Forum Romanum, p. 102 (vide Daniell's Chancery Practice, 7th ed. vol. i. p. 724), it is said: "It is to be observed, as a general rule, that the contemnor, who is contempt, is never to be heard, by motion or otherwise, till he has cleared his contempt and paid the costs." This view is confirmed by *Hewitt* v. *McCartney* (7), *Anon.* (8), and *Lord Wenman* v. *Osbaldiston*. (9) The onus is on the respondent to shew that she comes within one of the specific exceptions which have been established to the general rule, and it is submitted that she has not done this.

(1) 4 Sw. & Tr. 73.
(2) 15 W. R. 182.
(3) (1845) 5 Moo. P. C. 252, at p. 256.
(4) 1 Mol. 254.
(5) (1828) 1 Mol. 221, at p. 222.
(6) 3 My. & Cr. 197; 45 R. R. 254.
(7) (1807) 13 Ves. 560.
(8) (1808) 15 Ves. 174.
(9) (1719) 2 Bro. P. C. 276.

VAUGHAN WILLIAMS L.J. A preliminary objection has been taken to this appeal, namely, that the respondent is in contempt, and that therefore the appeal ought not to be heard.

The appeal is against so much of the order of March 10, 1903, as directs that the costs incident to a summons taken out by the wife in chambers and adjourned into Court should be payable out of her separate property, notwithstanding that that property is subject to a restraint on anticipation. Now the contempt which is relied upon as debarring the wife from appealing against that part of the order is thus set forth in the affidavit of Sir George Lewis: "Notwithstanding the undertaking of the respondent not to remove the said child out of the jurisdiction of the Court, and in defiance thereof, the respondent two or three days before the decision of the Court surreptitiously sent the child out of the country, and on the day the Court gave judgment she herself left England."

The undertaking was given antecedently to the hearing of the summons in Court, and the question which we have to determine is whether the objection that the respondent is in contempt ought to prevail. I think it ought not to prevail here.

We have heard a great deal about cases which were decided in the Courts of Chancery and of the rules and principles which were laid down by various judges, including Lord Cottenham, in reference to this matter of contempt, and when it should and when it should not debar a would-be appellant or applicant from being heard. Most of the cases are set out in the notes to *Chuck* v. *Cremer* (1), but I do not think it is necessary for me to go through them. In my opinion there are general principles which apply to this case, and which are not really affected by the decisions to which our attention has been particularly called. What I mean is this—that, taking it generally, it has not been disputed in the discussion before us that this rule, that a person who is in contempt cannot be heard, primâ facie applies to voluntary applications on his part—when he comes and asks for something, and not to cases in which all that he is seeking is to be heard in respect of matters of defence. I do not for one moment suggest that

(1) 1 Coop. temp. Cott. 205.

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every matter of defence entitles a person in contempt to be heard; for instance, if an order has been made in the exercise of the discretion of the Court, and some one who is oppressed, or thinks himself oppressed by that order, appeals, saying that the Court has exercised its discretion wrongly, that person if he is in contempt cannot be heard to say anything of the kind until he has purged his contempt. *Garstin* v. *Garstin* (1) is an instance of that kind. But when you come to the case of an order which it is suggested may have been made without jurisdiction, if upon looking at the order one can see that that really is the ground of the appeal, it seems to me that such a case has always been treated as one in which the Court will entertain the objection to the order, though the person making the objection is in contempt. It was admitted, and could not be otherwise than admitted, that if the objection was to the very order which had created the contempt, and the objection was one of the character which I have described, the fact that the objector was in contempt would not deprive him of the right to be heard.

I do not propose to consider the rule laid down by Lord Cottenham in *Barker* v. *Dawson* (2), because the sequence of events here, as stated in Sir George Lewis' affidavit, differed entirely from that with reference to which Lord Cottenham laid down the rule, that a person in contempt could not be heard. In the present case the contempt is shewn to have been before, not after, the order complained of; and his rule has, therefore, no application to the present case.

That being so, the simple point which we have now to decide is this. Here is an order the objection to which is obviously of a character which does not depend upon an exercise of the discretion of the Court. It is said that it is unlawful to make such an order in respect of the separate property of a woman who is subject to a restraint on anticipation —that is to say, unlawful for the Court by which the order was made and on the occasion on which it was made, and it is said that we ought not to look at the order because this lady, this divorced wife, is in contempt. In my judgment that is not so.

(1) 4 Sw. & Tr. 73. (2) 1 Coop. 207.

Having regard to the nature of the objection, in my opinion the present appellant is merely coming here to say, "This order which has been made against me is an illegal order, and it appears to be so upon the face of the order itself." That being so, no rule has been brought to our notice which, in my opinion, should prevent her from being heard.

I wish only to add that, supposing this order is in fact an illegal order, and we were to refuse to hear the appellant now, it by no means follows that there would not be any opportunity hereafter of questioning the order. But be that how it may, I think that, having regard to the fact that the objection is to the legality of the order, it would not be right to allow the order to continue in force without first determining the question of its legality.

I think that under these circumstances we ought to hear the appeal.

STIRLING L.J. I also think that the appeal ought to be heard. The counsel for the husband have relied very much on the decision of Lord Cottenham in *Chuck* v. *Cremer*. (1) If I thought that our decision involved a departure from what was there laid down by Lord Cottenham, I should desire to consider the matter further; but, when the sequence of events is ascertained, it appears to me that the present case is not identical with *Chuck* v. *Cremer*. (1) In that case the order of events was this: "The defendant moved that an injunction granted ex parte might be dissolved; his application was unsuccessful, and he gave notice of motion by way of appeal. Previously to the notice of the appeal motion being given, an attachment was issued against the defendant for not having put in his answer. Upon the motion being opened it was objected that the defendant was in contempt, and could not be heard." The Lord Chancellor gave effect to the objection, but he said: "That a party was entitled to be heard if his object was to get rid of the order or other proceeding which placed him in contempt, and he was also entitled to be heard for the purpose of resisting or setting aside for irregularity any proceedings subsequent to

(1) 1 Coop. 205.

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his contempt." Here, according to the affidavit which the husband has himself put forward, the contempt began two or three days before the order in question was made. Therefore, by allowing the appeal to be heard we shall not be in any way contravening what Lord Cottenham there said. And here the question is not merely one of irregularity in the order, but it is one of want of jurisdiction in the Court. Having regard to that, I entirely agree that the appeal ought to be heard.

COZENS-HARDY L.J. I agree. Until recently no Court had jurisdiction to direct the payment of costs out of the separate estate of a married woman subject to restraint on anticipation. But the Married Women's Property Act, 1893, has by s. 2 in terms enacted that in certain cases the Court shall have jurisdiction from time to time to order payment of costs out of property of a married woman which is subject to a restraint on anticipation. This is plainly a limited jurisdiction, and the only object of the present appeal, as I understand it, is to raise the contention that this is not one of the limited class of cases in which that jurisdiction is given to the Court by s. 2 of the Act.

That being so, I entirely agree with my learned brethren that the preliminary objection ought to be disallowed. But I desire expressly to limit my judgment to a case in which the respondent is saying that the order complained of is outside the jurisdiction of the Court, as distinguished from the case of an order which, although it is within the jurisdiction of the Court, ought not, it is said, to have been made.

So far as I can see there is no principle, nor do I think there is any authority, opposed to the view which we are taking. Speaking for myself, I have been unable to discover what principle, if any, is at the root of the distinction which has been taken, in some of the cases cited to us, between contempt committed before and contempt committed after the making of the order which it is sought to set aside.

Bargrave Deane, K.C., and *Method*, for the respondent. It is submitted that the Court had no jurisdiction under the circum-

stances to make this order for the payment of costs out of the wife's separate property which is subject to a restraint on anticipation. Sect. 2 of the Married Women's Property Act, 1893, gives jurisdiction to make such an order only "in any action or proceeding now or hereafter instituted by a woman or by a next friend on her behalf." It has been held that this means "an action or some other litigation initiated by the married woman": *Hood Barrs* v. *Cathcart* (1); *Hood Barrs* v. *Heriot*. (2) There is no jurisdiction to make such an order except under that section. It is submitted that this summons was a step in the divorce suit, and not a litigation initiated by the wife.

Duke, K.C., and *Priestley, K.C.*, for the petitioner. When the decree nisi was made absolute the divorce suit came to an end.

[COZENS-HARDY L.J. The summons was entitled in the suit.]

It ought not to have been so entitled. The jurisdiction of the Court over the custody of children is a statutory jurisdiction independent of the divorce proceedings. The jurisdiction was conferred by s. 4 of the Matrimonial Causes Act, 1859 (22 & 23 Vict. c. 61), which provides that an application for the custody of children may be made (by petition) after a final decree. It is an independent proceeding, and the section does not say by whom the petition may be presented. It is submitted that the application might be made by some other person than the father or mother, e.g., by a grandfather or by an uncle or aunt. The grounds alleged for the application in the present case were matters outside the divorce proceedings.

[COZENS-HARDY L.J. The decree nisi gave the custody of the child to the father "until further order."]

It is submitted that this summons constituted an initiation of a new litigation by the wife, and consequently the jurisdiction given by s. 2 of the Act of 1893 applies. It has been held that a written claim made by a married woman to goods taken in execution by a creditor of her husband and served by her on the high bailiff of a county court was a "proceeding instituted by her": *Nunn & Co.* v. *Tyson*. (3)

(1) [1894] 3 Ch. 376. (2) [1897] A. C. 177, 179. (3) [1901] 2 K. B. 487.

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VAUGHAN WILLIAMS L.J. I have not the slightest doubt that this summons was a step in the divorce suit, and that it did not initiate any new litigation. Under these circumstances it is plain, having regard to the decisions in *Hood Barrs* v. *Cathcart* (1) and *Hood Barrs* v. *Heriot* (2) and other cases, that there is no jurisdiction to make an order for the payment of costs out of this lady's separate property which is subject to a restraint on anticipation.

I do not think it is necessary for me to say any more. It is admitted that an order for the payment of these costs out of such property cannot be made unless the costs come within the words of s. 2—that is, unless they are costs of a proceeding initiated by the married woman. In my opinion this summons was not initiated by the married woman, but was a mere step in the previous litigation.

STIRLING L.J. I am of the same opinion. Two orders were made by the Divorce Court on November 25, 1901. The first was the decree nisi in the suit by which, after the provisions with reference to the dissolution of the marriage, it was ordered that the only child of the marriage "do remain in the custody of the petitioner until further order of the Court; but it is directed that such child be not removed out of the jurisdiction of the Court without its sanction." The other order of November 25, 1901, was that the child be "forthwith delivered up to and do remain in the custody of the petitioner until further order of the Court." Both orders were of a temporary nature, "until further order." Afterwards, on October 15, 1902, the wife took out a summons by which she asked that those orders should be varied. The question we have to decide is this—whether within the meaning of s. 2 of the Married Women's Property Act, 1893, this was a proceeding "instituted by" the wife. It has been held by the House of Lords as well as by this Court that, as Lord Herschell said (3), those words "refer to an action or some other litigation initiated by the married woman." Can it then be said that this summons

(1) [1894] 3 Ch. 376. (2) [1897] A. C. 177.
(3) [1897] A. C. at p. 179.

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was "an action or other litigation initiated by" the married woman? I think not. It seems to me to be simply a continuation of the litigation which had been commenced by the husband by the institution of the suit for the dissolution of the marriage, in which from the very first the question of the custody of the child was a subject of litigation, and was not finally determined by the two orders to which I have referred.

COZENS-HARDY L.J. I am of the same opinion. It seems to me that both in form and in substance this application by the wife was made by her in the suit of *Gordon* v. *Gordon*, and was not an independent proceeding initiated by her.

Appeal allowed.

Solicitors: *Dangerfield & Blythe; Lewis & Lewis.*

W. L. C.

[DIVISIONAL COURT.]

1904
March 1.

FROWD *v.* FROWD.

Husband and Wife—Desertion—Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 *Vict. c.* 39), *ss.* 4, 5 (*a*)—*Matrimonial Causes Act*, 1857 (20 & 21 *Vict. c.* 85), *ss.* 27, 31—*Misconduct, on part of Complainant, short of a Matrimonial Offence—Ground for Cessation of Cohabitation.*

"Desertion" under the Summary Jurisdiction (Married Women) Act, 1895, means, and is to be interpreted and dealt with as meaning, the same as desertion under the Matrimonial Causes Act, 1857, save that no period is specified as requisite to constitute the offence.

THIS was an appeal from an order, dated February 1, 1904 made by certain justices sitting in petty session at Eastbourne, whereby, after finding that the appellant (husband) had deserted his wife, the justices ordered a separation and an allowance of 15*s.* weekly for the wife's support.

The main ground of appeal was that the justices declined to allow counsel for the husband to cross-examine the wife or to call evidence with a view to shewing that, short of a

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matrimonial offence, the wife's conduct had been such as to justify the husband in declining to live with her.

Le Bas, for the appellant. If the view of the justices be right, a wife may be guilty of any conduct short of actual adultery, and the husband, if he turns her out or leaves her, is to be held guilty of desertion, and liable to be visited with all the consequences of a decree of judicial separation. [He referred to s. 5 (*a*) of the Act of 1895 (1), and relied upon *Yeatman* v. *Yeatman* (2), *Synge* v. *Synge* (3), *Russell* v. *Russell* (4), *Oldroyd* v. *Oldroyd* (5), and *Wassell* v. *Wassell*. (6)]

[He was stopped by the Court.]

Slater, for the respondent (wife). There is no mention in the Act of 1895 of desertion "without reasonable cause" or "without reasonable excuse." A case of desertion, in fact, was made out in the Court below. So far as the Act of 1895 is concerned, nothing short of adultery entitles a husband to turn his wife out or to desert her.

[GORELL BARNES J. Suppose she broke his head with a poker?

JEUNE P. Suppose the circumstances were such that it was intolerable that the husband should be expected to live with his wife, do you say that he would still be bound to go on living with her? If a wife has, by her conduct, short of a matrimonial offence, rendered her husband's position with her intolerable, do you contend that there is desertion on his part if he turns her out or leaves her?]

Yes; if he does not support her. The evidence shews that the reason for his turning his wife out was not the discovery of the fact that she was still communicating with a man with

(1) The Summary Jurisdiction (Married Women) Act, 1895, provides (s. 5) that the Court of summary jurisdiction to which any application under this Act is made may make an order or orders containing all or any of the provisions following, namely:—

(*a*) A provision that the applicant be no longer bound to cohabit with her husband (which provision, while in force, shall have the effect in all respects of a decree of judicial separation on the ground of cruelty).

(2) (1868) L. R. 1 P. & M. 489.

(3) [1900] P. 180; [1901] P. 317.

(4) [1895] P. 315.

(5) [1896] P. 175.

(6) (1899) 68 L. J. (P. & M.) 127.

whom she had formerly admitted misconduct, but the fact that she stayed out all night.

JEUNE P. This appeal must be allowed. It is true that the only defence specified in the Act of 1895 is the commission of adultery. But desertion has to be proved to found the claim of the wife, and desertion under that Act is the same as we understand it in this Court under the Matrimonial Causes Acts. The expression desertion "without reasonable excuse" in the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), ss. 27, 31, and the equivalents of that expression "without just cause" or "without good cause," have always struck me as somewhat loose and inaccurate language. Desertion means the cessation of cohabitation brought about by the fault or act of one of the parties. Therefore, the conduct of the parties must be considered. If there is good cause or reasonable excuse, it seems to me there is no desertion at all in law. The view taken by the justices and the contention advanced here to-day by counsel for the wife are directly in conflict with the decisions cited by Mr. Le Bas, which, according to the note of the evidence taken by the justices' clerk, were "overruled" by the Court below. The case must, therefore, be remitted to be dealt with by the justices after a full and proper hearing, which, of course, includes hearing the evidence on both sides.

GORELL BARNES J. "Deserted" does not mean any and every separation, without considering how such separation has been brought about.

Appeal allowed.

Solicitors for appellant (husband): *Ford, Lloyd & Co., for Hillman & Burt, Eastbourne.*

Solicitor for respondent (wife): *F. W. A. Cushman.*

H. D. G.

[IN THE COURT OF FACULTIES.]

MELBOURNE NOTARIES.

1904
Jan. 21;
Feb. 10.

BAILLEAU *v.* THE VICTORIAN SOCIETY OF NOTARIES.

Notary—Appointment of Notaries Public—25 Hen. 8, c. 21 — Discretion of Master of Faculties as to Appointments in Colonies—Number of Notaries Public practising at Melbourne—Practice—Costs.

The jurisdiction of the Court of Faculties to appoint notaries public in the colonies is derived from the statute of the 25 Hen. 8, c. 21, and neither that nor any other statutory enactment prescribes any qualifications to be possessed by applicants, who in all cases are appointed in the discretion of the Master of the Faculties.

Where, therefore, a chartered accountant, holding the appointments of official assignee of insolvent estates in the State of Victoria and commissioner for taking affidavits in the Supreme Courts of several States of the Australian Commonwealth, applied to be appointed a notary public for the State of Victoria, and supported his application by an influential memorial and the usual certificate of personal fitness, the Master of the Faculties, though the more recent practice had been to appoint solicitors, thought fit in the special circumstances of the case to grant the applicant a faculty for his appointment as prayed.

By this appointment the number of notaries practising at Melbourne and in the State of Victoria was raised to thirty-seven.

Circumstances which guide the Master of the Faculties in fixing the number of notaries public to be appointed in any particular place where the appointments are made in his discretion.

THIS was an application by Arthur Sydney Bailleau, of Collins Street, in the city of Melbourne, in the State of Victoria, incorporated accountant, and holding the appointments of assignee of insolvent estates under the insolvency laws of that State (54 Vict. No. 1102, 61 Vict. No. 1513, and No. 1836 of 1903); of registered trustee under the same laws, and of auditor of companies under the Companies Act, 1896, of Victoria (60 Vict. No. 1482), and a commissioner to take affidavits in the Supreme Courts of Victoria, New South Wales, Western Australia, and South Australia, to be appointed and admitted a notary public to practise in the State of Victoria.

The applicant, in addition to a petition praying that the Master of the Faculties would create him a notary public to practise, as above stated, and a certificate of personal fitness signed by three notaries public, brought in to the registry a memorial or certificate in support of his petition signed by several members of the Executive Council and the Legislative Assembly of Victoria, and by representatives of banks and mercantile firms and other persons, which stated (inter alia) that, owing to the increase of trade and commerce between the Australian States, and in the State of Australia, consequent upon the establishment of the Commonwealth of Australia, and the development of the city of Melbourne and its suburbs, the appointment of the applicant as a notary public was desirable in the public interest.

The application was opposed by the Victorian Society of Notaries, and a counter-memorial filed on their behalf raised the three following objections to the appointment of the applicant: (1.) That the applicant had neither had a legal education nor had he served articles to a notary, and was on these grounds not duly qualified to undertake the duties of a notary. (2.) That, by reason of the applicant holding the position of official assignee under the Insolvency Acts of the State of Victoria, he would, if a notarial faculty should be granted to him, be able to acquire legal work, and practically compete in such work with the other notaries, who are solicitors who have legitimately and at great expense qualified themselves as solicitors and notaries. (3.) That the number of notaries holding faculties and residing in the State of Victoria, and especially at Melbourne, is amply sufficient.

1904. Jan. 21. The application came on to be heard before the Master of the Faculties (Sir Lewis Dibdin, K.C.).

It appeared from a memorial of the applicant in reply, dated on or about October 27, 1903, that one of the number of notaries practising at Melbourne at the commencement of the proceedings in January, 1903, had since died, and that no appointment to the vacancy caused by his death had been made at the date of the memorial in reply.

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G. A. Scott appeared for the applicant.

Muir Mackenzie appeared for the opponents.

[The following authority was referred to: *Graham* v. *Smart*. (1)]

Cur. adv. vult.

1904. Feb. 10. THE MASTER OF THE FACULTIES. This is an application by Mr. Arthur Sydney Bailleau of Melbourne, in the State of Victoria, Australia, holding an official position as assignee under the Insolvency Acts of Victoria, and also following the profession of an accountant, to be appointed a notary public in the State of Victoria. His application is supported by a large number of influential men in public and business life in the colony, who testify to his personal fitness, and to their opinion that the increase of trade and commerce in Melbourne and the State of Victoria generally makes it desirable in the public interest that Mr. Bailleau, especially having regard to his legal and other duties as a public officer, should be appointed. Amongst those who express this opinion are gentlemen representing many of the leading banks, insurance companies, and mercantile houses in Melbourne, the chairman of the Melbourne Stock Exchange, the Attorney-General of the Commonwealth of Australia, and the chief clerk of the Supreme Court of Victoria. I refer to these rather than to gentlemen, of whom there is a long and distinguished list, holding high political or ecclesiastical positions, because their business and official duties give them better opportunities of judging how far the requirements and convenience of the public suggest the appointment of an additional notary, and also of judging whether the applicant, of whom they all speak with personal knowledge, is qualified by technical training and experience as well as character to discharge the functions of the office.

Mr. Bailleau's application is opposed by the Society of Notaries of Victoria on three grounds: (1.) That there are already enough notaries in the State of Victoria. (2.) That Mr. Bailleau is not a solicitor. (3.) That his official position

(1) (1863) 9 Jur. (N.S.) 387.

would give him an opportunity of unfair competition with the existing notaries.

With regard to the first ground, it appears that there are now thirty-six notaries practising in the State of Victoria, whilst one other notary in practice there at the commencement of the proceedings in this suit has recently died. Reference is made in the opponents' memorial to an order or memorandum issued by my learned predecessor, Dr. Lushington, and dated February 23, 1859, to the effect that no further appointments of notaries for Melbourne were to be made unless they should be shewn to be necessary by reason of the death or retirement of existing notaries, or "the increase of the colony or other changes." I have consulted the papers containing the information on which this order was founded—they are filed in the Faculty Office—and I find that it was stated in them that at that date the population of Melbourne was 52,720, and that of the whole colony 395,603, while the then number of notaries was twenty. The present population of Melbourne is said to be about 500,000, and of the whole State of Victoria 1,200,000. I need not say the mercantile business of Melbourne has also vastly increased. It would seem, therefore, that the increase of the number of notaries from twenty to thirty-six is by no means in proportion to the growth of the colony in population and commerce. The question of the proper number of notaries for any particular place is always a difficult point to deal with. The first and controlling consideration must be the convenience of the public. Dr. Lushington laid this down in *Graham* v. *Smart* (1) in this Court; but it would be clear without authority that no body of men entrusted with public duties could be heard to say that their number must be kept down to the prejudice of the public interest in order that the profits of the members of the body, derived from the discharge of those duties, might not be diminished. But, on the other hand, where no question of the public interest is involved, it has always been the practice of the Master of the Faculties to see that the existing notaries, who have spent, it must be remembered, considerable sums in

(1) 9 Jur. (N.S.) 387.

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order to become notaries, are not injured by an indiscriminate multiplication of competitors. The first question here, therefore, is whether I am so completely satisfied that the number of notaries in this State is already adequate as to refuse the application on that ground. No general rule can be laid down, but each case must be judged by its own circumstances. The Society of Notaries of Victoria submit in their memorial that there are already "amply sufficient notaries in Melbourne," and they have supported their allegation by a map shewing how thickly the offices of the existing notaries are dotted about in the immediate neighbourhood of the applicant's office and of the business quarter of Melbourne. I do not underrate the importance of this expression of opinion so supported; but it seems to me that having regard to the enormous growth of population in Melbourne in the last forty years, and to the very strong testimony of the memorialists in favour of Mr. Bailleau, that his appointment would be "a great convenience to the business community," I cannot refuse to make it on the ground that the public interest would not be served if I made the appointment.

The second ground of opposition is that Mr. Bailleau is not a solicitor. With regard to England, where my jurisdiction in this matter is more defined by statute than in the case of the colonies, a notary—save in a few exceptional cases, such as those of registrars of the ecclesiastical and other Courts—cannot be admitted unless he has either served articles of apprenticeship to a notary or is a solicitor. A notary's duties, which are very various, certainly in practice include some which require technical knowledge and training, and can as a general rule be most safely entrusted to those who have had a legal training. Apprenticeship to a notary is unknown in the colonies; and it has not been the practice of this Court absolutely to confine colonial appointments (as to which the choice of the Master of the Faculties is unfettered) to solicitors. I can well understand that in the early days of some colonies it would be practically impossible so to limit appointments. Even at Melbourne at the present time there are a few notaries who have never qualified in this way. Of course in a great city

like Melbourne there cannot now be, or for many years past have been, any lack of properly trained lawyers to act as notaries. As a matter of fact, every notary admitted for the State of Victoria during the last twenty-five years has been a solicitor. While this seems to me a wise practice, and one which is for the protection of the public and to be maintained, I am not prepared to say that under no circumstances, however exceptional, will this Court ever depart from it. What I do say is that in order to induce me to depart from it the case must be very exceptional, and I must be satisfied that the applicant's ability to perform the duties of a notary, of which the fact of being a solicitor is taken as evidence, has been established in some other way. I think this is such a case. Mr. Bailleau is not a solicitor, but he holds an official position demanding from its occupant familiarity with legal documents and a certain amount of legal knowledge. He is a commissioner of the Supreme Court for taking affidavits in four of the Australian States, and, in addition to other evidence that he fulfils the duties of those various offices efficiently, I have a certificate of Holroyd J., one of the judges of the Supreme Court of Victoria, given on the strength of long personal knowledge, that Mr. Bailleau is a fit and proper person to be appointed a notary. I have also a certificate from three notaries (one of whom was till his recent death President of the Society of Notaries of Victoria, who are the opponents before me), who testify that Mr. Bailleau is "a person fitly qualified to be created a notary public." I think in face of these facts it would be wrong to hold that this gentleman must nevertheless be deemed incompetent to do the work of a notary because he is not a solicitor. I am satisfied he is well able to do the work, and, as I am not prevented either by statute or the practice of my predecessors from appointing him because he is not a solicitor, I think this ground of objection fails.

There remains the third objection, that Mr. Bailleau's official position gives him special opportunities of competition with other notaries. I think the area of this competition is narrower than was at first supposed by either side. It was suggested as one of the advantages of Mr. Bailleau's appointment that

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he would be able to notarially attest documents executed by bankrupts for the purpose of vesting their extra colonial property in their trustee in bankruptcy; but Mr. Muir Mackenzie, for the opponents, pointed out that in many cases of insolvency Mr. Bailleau in his official capacity as assignee would himself be the trustee, and that it would be impossible for him to notarially attest a deed to which he was a party or under which he acquired an interest. In all such cases it is clear another notary must be employed. But whatever substance there may be in the objection—and I am not prepared to say there is none—I do not think I ought because of it to refuse to make an appointment which independently has been shewn to my satisfaction to be for the public benefit. It seems to me that any danger of unfair competition, if there be any, arises from a system which the colonial authorities (I doubt not for good and sufficient reasons) have established of allowing a gentleman holding Mr. Bailleau's official position to carry on his profession for his own profit at the same time. I think if there is any objection to that system it is a matter entirely for the colonial authorities or legislature, and that I should be going outside my province if I held that because the arrangement in the State of Victoria is what I have described I must refuse to appoint Mr. Bailleau a notary.

In my opinion the opposition to this application is not well founded, and the faculty for Mr. Bailleau's appointment will therefore issue. It will be in the usual form. The statute of 25 Hen. 8, c. 21, contains no provision as to costs, and I am informed by the registrar, who has been conversant with the practice here for the last fifty years, that orders for costs are never made in these cases as to the appointments of notaries. I ought to add that I do not think this is a case for costs even if I had power to award them. (1)

Solicitors for applicant: *Burn & Berridge.*

Solicitors for opponents: *Harwood & Pusey.*

(1) For recent cases reported as to the appointment of notaries public in England, see *Tunbridge* v. *Mathews*, [1903] W. N. 158, and *Eaton* v. *Watson*, [1904] W. N. 24.

C. F. J.

[DIVISIONAL COURT.]

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Admiralty — Damage by Ship to Pier — "Collision" — County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 *Vict. c.* 71), *s.* 3, *sub-s.* 3—*County Courts Admiralty Jurisdiction Amendment Act*, 1869 (32 & 33 *Vict. c.* 51), *s.* 4—*Prohibition.*

Damage done by a ship to a pier is not "damage by collision" within s. 3, sub-s. 3, of the County Courts Admiralty Jurisdiction Act, 1868, and, therefore, a county court has no Admiralty jurisdiction in respect of such damage.

MOTION, by defendants, the owners of the steamship *Normandy*, for a writ of prohibition directed to the judge of the Barnstaple County Court to restrain him from further proceeding with the hearing of an Admiralty cause, to recover the sum of 200*l.* in respect of alleged damage to a pier, brought by the plaintiff, Reginald Joseph Weld, a person of unsound mind, by Edward Talbot Wolseley and Agnes Frances Weld, the committees of his estate.

The case is reported on the question of the meaning of the words "damage by collision" in s. 3, sub-s. 3, of the County Courts Admiralty Jurisdiction Act, 1868. (1)

On December 15, 1903, a summons in rem was issued on behalf of the plaintiff in an action instituted in the Barnstaple County Court against the steamship *Normandy*, and by the particulars subsequently delivered the plaintiff claimed "damages

(1) 31 & 32 Vict. c. 71, s. 3: "Any county court having Admiralty jurisdiction shall have jurisdiction, and all powers and authorities relating thereto, to try and determine, subject and according to the provisions of this Act, the following causes (in this Act referred to as Admiralty causes):

"(3.) As to any claim for damage to cargo, or damage by collision—any cause in which the amount claimed does not exceed three hundred pounds."

By the County Courts Admiralty Jurisdiction Amendment Act, 1869 (32 & 33 Vict. c. 51), this section is amended as follows:—

Sect. 4: "The third section of the County Courts Admiralty Jurisdiction Act, 1868, shall extend and apply to all claims for damage to ships, whether by collision or otherwise, when the amount claimed does not exceed three hundred pounds."

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for collision by reason that the steamship *Normandy* through bad navigation struck the pier at Ilfracombe in the county of Devon on August 4, 1903, and thereby did damage to the said pier to the extent of 200*l*."

The pier in question, which was alleged to have been damaged by the defendants' vessel, is a fixed structure erected on piles, always surrounded by the sea, but no part is afloat.

Feb. 2. *Dawson Miller*, for the defendants, in support of the motion. A county court judge sitting in Admiralty has no jurisdiction in this case. The action is by the owner of a pier against a ship for alleged damage caused by the ship to the pier; but the only two sections which can be invoked in order to found jurisdiction to entertain an action in rem against a ship in respect of damage caused by the ship to a fixed structure such as a pier are sub-s. 3 of s. 3 of the County Courts Admiralty Jurisdiction Act, 1868, where the words are "damage by collision," and s. 4 of the County Courts Admiralty Jurisdiction Amendment Act, 1869, where the words are "damage to ships, whether by collision or otherwise." Neither of these sections will justify the county court judge in proceeding to hear and determine this matter.

In *Everard* v. *Kendall* (1) a writ of prohibition issued to the judge of the City of London Court on the ground that neither of the above-mentioned Acts enabled a county court to exercise Admiralty jurisdiction in respect of a collision on the Thames between two barges propelled by oars only, for the jurisdiction of the county court in cases of collision is not more extensive than that of the High Court of Admiralty, and the Court of Admiralty had no jurisdiction over such a collision. Montague Smith J. in his judgment, when referring to sub-s. 3 of s. 3 of the Act of 1868, says that "damage by collision is damage sustained by a ship from another ship coming in contact with it." This view was adopted in *Robson* v. *Owner of the Kate* (2), where it was held that damage occasioned to an object on the bank of a river by contact with the sailing gear of a vessel afloat in the river was not "damage by collision" within the

(1) (1870) L. R. 5 C. P. 428. (2) (1888) 21 Q. B. D. 13.

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meaning of the sub-section in question; and Grantham J., after quoting the above-mentioned judgment of Montague Smith J., adds, "that the intention of the legislature was to confine the newly-conferred jurisdiction to cases of collision between ships."

It is true that under s. 6 of the Admiralty Court Act, 1840, the High Court of Admiralty acquired jurisdiction in respect of "damage received by any ship" within the body of a county, and by s. 7 of the Admiralty Court Act, 1861, the Court acquired jurisdiction over any claim for "damage done by any ship"; so that, in the language of Lord Herschell in *The Zeta* (1), "the Act of 1861 applies to damage done by a ship to persons and things other than ships"; but that will not give a county court jurisdiction, for, though in that case it was held that under s. 4 of the County Courts Admiralty Jurisdiction Amendment Act, 1869, the county court jurisdiction included a claim for damage to a ship by collision with an object which was not a ship, namely, a pier-head, the present case is the converse of that case, and is not covered by the words of the Act of 1869, for the word "collision" is stated by Lord Macnaghten (2) to mean "collision between two vessels." This creates the difficulty as to jurisdiction in this case which did not arise in that case, as the words "or otherwise" in s. 4 of the Act of 1869 covered the case of damage *to* a ship, but will not cover the present case of damage *by* a ship.

Herbert Chitty, and *H. Stuart Moore*, for the plaintiff, contra. The effect of the statutes of 1868 and 1869 is to give the county court jurisdiction to try, up to 300*l.*, any of the causes mentioned in s. 3 of the former Act and s. 4 of the latter Act without reference to the jurisdiction of the High Court of Admiralty; but it is sufficient for the purposes of this case to say that, up to the limited amount, these two statutes give the county courts the jurisdiction of the Admiralty Court.

The case of *Everard* v. *Kendall* (3) did not lay down any general principle. It only decided that there was no jurisdiction in the case of a collision on the river between two dumb-barges, and the dicta of the judges relied on by counsel for the

(1) [1893] A. C. 468, at p. 478. (2) [1893] A. C. at p. 490.
(3) L. R. 5 C. P. 428.

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defendants were not necessary for the decision of the case, which did not turn on the meaning of the word "collision," but on the question of the jurisdiction of the High Court in the case of two barges. The same reasoning applies to *Robson* v. *Owner of the Kate* (1), which depends on the earlier case, and Wills J. rests his judgment on the fact that the damage was done to an object on land outside the ebb and flow of the tide, which the learned judge says "would certainly not have fallen within the original jurisdiction of the Court of Admiralty in respect to collision"; but in *The Malvina* (2), cited in argument in that case, where damage was done by a sea-going vessel to a barge within the body of a county, the Privy Council held, "that it was the intention of the Legislature, to be gathered from the words and the whole scope of the statute (24 Vict. c. 10), to give the utmost extent of jurisdiction to the Court of Admiralty in cases of collision"; and in *The Zeta* (3), where it was held that a county court had jurisdiction in respect of a claim for damage to a ship by "collision" with an object which was not a ship; Lord Herschell L.C. does not restrict the word "collision" to collision between ships. At the outset of his judgment (4) he says that, "The cause of action which the respondents established was that their vessel had sustained damage owing to a *collision* with the dock wall of the appellants, such *collision* being due to, &c."; and further on (5) the same learned judge says: "I think that a vessel might by the negligence of the owner of a fixed object come into *collision* with it, and thus sustain damage"; and Fry L.J., who was the dissentient judge in the Court below, says (6): "It requires no very great stretch of imagination to imagine rafts of timber, or some such structure, getting permanently attached to a coral reef, or rocks, or a sand bank, and to imagine a *collision* between that object upon the high seas and some vessel." It is clear, therefore, that the word "collision" is applied to contact between other things than ships, and it is clear also that both objects need not be moving, as in the common case of one ship

(1) 21 Q. B. D. 13.
(2) (1863) Br. & L. 57.
(3) [1893] A. C. 468.
(4) [1893] A. C. at p. 476.
(5) [1893] A. C. at p. 487.
(6) [1892] P. 285, at p. 300.

being at anchor: see *The Indus* (1), where Lord Esher M.R. says: "they do not even make out a primâ facie case that the *collision* was solely the fault of the pilot." Again, an action of damage by collision may be brought in the Admiralty Court although the vessels have not been in collision at all, but one of them has been driven ashore in an attempt to avoid collision with the negligent vessel: see *The Industrie* (2), where Sir Robert Phillimore says: "I think it is now established that this Court has jurisdiction where damage has been done or received by a ship although there may not have been any *collision* between two or more ships"; and the same learned judge, when dealing with s. 74 of the Harbours, Docks, and Piers Act, 1847, and the acquisition by the owners of a pier, who are undertakers within the meaning of that Act, of a maritime lien in respect of damage done to their pier by a ship (*The Merle* (3), overruled in part but not on this point (4)), in the course of his judgment (5), when disposing of the argument that there was no lien upon the vessel, uses the word "collision," for he adds: "It is said that no maritime tort has been committed in this case, and that there is no lien upon the vessel for the damage done, because the *collision*, &c." No doubt in *The Robert Pow* (6) Dr. Lushington attempted to cut down the word "damage" in Admiralty to damage done by collision between vessels; but four years later in *The Uhla* (7) the same learned judge decided the contrary by allowing a cause of damage to proceed against a ship for injury done to a breakwater. The confusion on the subject seems to have arisen out of the Admiralty rule of division of damage where both are to blame, which is not applied except in the case of collision between ships.

In *The Munroe* (8) it was held that the damage sustained by a vessel running aground and resting on sunken wreck, and iron ore, which had formed part of the cargo of another vessel,

(1) (1886) 12 P. D. 46, at p. 48.
(2) (1871) L. R. 3 A. & E. 303, at p. 307.
(3) (1874) 2 Asp. M. L. C. 402.
(4) *River Wear Commissioners* v. *Adamson*, (1877) 2 App. Cas. 743.
(5) 2 Asp. M. L. C. at p. 407.
(6) (1863) Br. & L. 99.
(7) (1867) L. R. 2 A. & E. 29, n.
(8) [1893] P. 248.

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was "loss or damage through collision with sunken wreck" within the meaning of a policy of insurance containing a clause as to collision. A similar view was adopted by Mathew J. in *Union Marine Insurance Co.* v. *Borwick* (1), where that learned judge declined to accept fine distinctions between the words "collision" and "striking," and held that the loss or damage from a vessel driving on to the boulders of a breakwater was within a clause in a policy of reinsurance against "loss or damage, through collision with (inter alia) piers or stages or similar structures"—in other words, it is submitted that the word "collision" is used in the County Court Act of 1868 in a wide sense so as to include collision, whether with a ship or other object.

The effect of the case of *Reg.* v. *Judge of the City of London Court* (2) is to shew that, assuming that a county court has no greater jurisdiction than that which was possessed by the Admiralty Court, except with regard to charterparties, yet to a limited amount it possesses all the jurisdiction of the Admiralty Court in respect of collision. Lopes L.J. says (3): "In my opinion the cases are clear to shew that the jurisdiction which has been conferred upon the county courts is the jurisdiction of the Admiralty Court, except in one particular . . . . but only a limited jurisdiction—a jurisdiction up to 300*l.*" Kay L.J., referring to the Act of 1868, says (4): "This Act has no preamble; but the object being to give 'Admiralty jurisdiction' to county courts within specified districts up to certain limited amounts, primâ facie the meaning must be to give them a jurisdiction similar to that of the Court of Admiralty—that is, in the case of collision, such a jurisdiction as that Court would have had if the collision had happened on the high seas"; and the same learned judge further on says (5): "The words of the Act of 1868 are 'damage by collision,' not saying damage to what or by what; but no one could doubt that the words must mean damage up to 300*l.* in such a case of collision as the High Court of Admiralty could have entertained when the collision

(1) [1895] 2 Q. B. 279.
(2) [1892] 1 Q. B. 273.
(3) [1892] 1 Q. B. at p. 300.
(4) [1892] 1 Q. B. at p. 303.
(5) [1892] 1 Q. B. at p. 305.

was on the high seas"; and that learned judge suggests that the addition of the words "or otherwise" in s. 4 of the Act of 1869 was for the purpose of including damage caused to a ship when there was no actual collision, but she was forced into a position of danger and injured."

It would follow from this view of the Act of 1868 that the damage resulting from a ship striking a fixed object would in Admiralty language be deemed to have resulted from a "collision" with that object, so that the same interpretation must be put upon the word "collision" when occurring in sub-s. 3 of s. 3 of the Act.

If the argument of counsel for the defendants were to prevail, the effect would be that the owner of a ship could proceed in the county court against the owner of the pier for damage done, but the owner of the pier could not proceed in the county court by action or counter-claim against the owner of the ship. This would be an anomaly similar to that pointed out by Lord Herschell L.C. in *The Zeta* (1) in the passage: "It would be a strange result if, in the case of a ship striking against a dock wall, the Court of Admiralty had jurisdiction to entertain a claim for damage done to the dock wall by the ship, and not for damage done to the ship by its contact with the dock wall." In the same case Lord Macnaghten says (2): "There was, therefore, at the time when Admiralty jurisdiction was given to county courts, legislation in force which seems to have been intended, as Fry L.J. observes, 'to give reciprocal rights in case of damage done by a ship and to a ship,' and in both those cases . . . . it had been determined that it was not necessary that the body receiving or doing damage should be a ship."

Dawson Miller, in reply. The observations by learned judges, in the course of their judgments in the various cases cited by counsel for the plaintiff, do not support the contention that a county court acquired under the Act of 1868, up to a limited amount, all the jurisdiction of the Admiralty Court; for, if that were so even in respect of collision, the amending Act of 1869

(1) [1893] A. C. 468, at p. 478. (2) [1893] A. C. at p. 490.

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would have been unnecessary, and it is clear that the Legislature only intended that a county court should acquire jurisdiction in Admiralty in certain specified cases, for all the jurisdiction possessed by the Admiralty Court in respect of mortgage, bottomry, &c., has been purposely withheld.

The only point in *The Zeta* (1) was whether damage to a ship by a structure, such as a pier-head, was within the Admiralty jurisdiction. It was never contended that it could be within the jurisdiction of a county court under the Act of 1868; but it was successfully contended that, being within the jurisdiction of the Admiralty Court, it was within the jurisdiction of a county court under the words "damage to ships whether by collision or otherwise" in s. 4 of the Act of 1869—that is to say, the word "collision" is restricted to collision between ships, and the words "or otherwise" were added to include damage to ships otherwise than by collision, but not damage by ships to objects other than ships, though the Admiralty Court had jurisdiction in both cases, and the Legislature could have given the same jurisdiction to the county court had it been so minded.

[The case of *Cargo ex Argos* (2) was referred to.]

Cur. adv. vult.

Feb. 9. The judgment of the Divisional Court (Jeune P. and Gorell Barnes J.) was delivered by

GORELL BARNES J. In this case a motion was made for a writ of prohibition to the judge of the county court at Barnstaple to restrain proceedings in a suit by the committees of the estate of the plaintiff, the owner of a pier at Ilfracombe, in the county of Devon, against the defendants, the owners of the steamship *Normandy* of Liverpool.

According to an affidavit filed in the case, the summons was issued by the plaintiff in rem claiming 200*l.* against the steamship in respect of damage alleged to have been caused by the vessel to the pier, no part of which is afloat.

The suit was brought under sub-s. 3 of s. 3 of the County

(1) [1893] A. C. 468. (2) (1873) L. R. 5 P. C. 134.

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Courts Admiralty Jurisdiction Act, 1868, which is as follows:— [The learned judge read the section already set out, and continued:—]

The motion was ably argued before us on the 2nd inst., when it was contended by counsel for the applicants, the defendants in the suit, that the suit was not a cause as to a "claim for damage by collision" within the meaning of the sub-section, and that the question raised was covered by authority.

On the other hand, counsel for the respondent, plaintiff in the suit, argued that the words in the sub-section "claim for . . . . damage by collision" include a claim such as that made by the plaintiff, and that the authorities cited on behalf of the defendants were distinguishable from the present case and inconsistent with the judgments in the House of Lords in the case of *The Zeta*. (1)

The simple question is whether the words "damage by collision" in the sub-section include damage done to a pier by a ship striking against it.

The principal cases relied on by the applicants (defendants) were *Everard* v. *Kendall* (2) and *Robson* v. *Owner of the Kate*. (3)

In the former case it was held that the Admiralty jurisdiction of the county court in cases of collision was not more extensive than that of the High Court of Admiralty, and as the Court of Admiralty had no jurisdiction in the case of a collision on the Thames between two barges propelled by oars only, the county court had no such Admiralty jurisdiction. In the course of his judgment Montague Smith J. said: "What is the meaning of 'damage by collision'? We have nothing to guide us as to what damage by collision is within the Act, except the general scope and object of the Act. In common understanding, and as understood in the Court of Admiralty, damage by collision is damage sustained by a ship from another ship coming in contact with it." The late Master of the Rolls,

(1) [1893] A. C. 468. (2) L. R. 5 C. P. 428.
(3) 21 Q. B. D. 13.

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then Brett J., said the Act of 1868 "gives the county court power to try in a particular way questions of salvage, claims for towage, necessaries supplied to ships, and wages, and claims for damage to cargo or damage by collision. Damage by what collisions? Looking at ss. 7 and 22 of the Act of 1868, it seems to me that it means a collision between two vessels—such vessels as were formerly dealt with in the Admiralty Court."

These dicta are favourable to the defendants' contention in this case; but the case is not conclusive in their favour, because the basis of the decision appears to have been that it was not the intention of the Legislature to give the county courts Admiralty jurisdiction over Admiralty causes other than those over which the Admiralty Court had jurisdiction, and that the Court of Admiralty had no jurisdiction in respect of such a collision as that in question in the case. It did not decide what jurisdiction the county courts have within their limit of amount in cases of damage done by a ship in which the Admiralty Court has jurisdiction.

In *Robson* v. *Owner of the Kate* (1) it was held that damage occasioned to an object on the bank of a river by contact with the sailing gear of a vessel afloat in the river was not "damage by collision" within s. 3, sub-s. 3, of the County Courts Admiralty Jurisdiction Act, 1868, so that a county court had no Admiralty jurisdiction in respect of such damage. Wills J. in the course of his judgment said: "It is not necessary to define the word 'collision.' The words 'damage by collision' used as here in an Act the object of which is to confer an 'Admiralty' jurisdiction, cannot be construed as including damage which has taken place on land, outside the ebb and flow of the tide, and which would certainly not have fallen within the original jurisdiction of the Court of Admiralty in respect to collision"; and Grantham J. said: "In *Everard* v. *Kendall* (2), which was a proceeding by way of prohibition under this Act, Montague Smith J. is reported to have said": he then quotes the passage I have already referred to, and adds:

(1) 21 Q. B. D. 13. (2) L. R. 5 C. P. 428.

"This explanation seems to me well founded, and I think the preceding words 'damage to cargo,' which obviously refer to damage to cargo while on board a ship, tend to shew that the intention of the legislature was to confine the newly-conferred jurisdiction to cases of collision between ships." The reason given by the latter judge for his decision is applicable to the present case; but the basis of the judgment of Wills J. is that the damage was on land outside the ebb and flow of the tide, whereas if there be any distinction in the case before us the damage is to a structure which stands in the sea.

The case mainly relied on by counsel for the plaintiff was *The Zeta* (1), in which it was held that the jurisdiction given by s. 3 of the County Courts Admiralty Jurisdiction Act, 1868, and extended by s. 4 of the County Courts Admiralty Jurisdiction Amendment Act, 1869, included a claim for damage to a ship by collision with an object which was not a ship, e.g., a pier-head.

That case turned on s. 4 of the amending Act of 1869. The argument for the appellants, the Mersey Docks and Harbour Board, which succeeded in the House of Lords, was that s. 4 of the Act of 1869 had clear words which gave the county courts jurisdiction in "all claims for damage to ships whether by collision or otherwise," and that the Admiralty Court had jurisdiction over such cases. The respondents do not appear to have disputed that the case fell within the language used in s. 4; but argued that it was not intended to confer jurisdiction beyond that possessed by the Court of Admiralty, and that the action was not within that jurisdiction. The judgments were to the effect that the Admiralty Court had jurisdiction over claims of the character of that in question in the case, and that the claim fell within the words of s. 4.

Reference was also made by counsel for the plaintiff to expressions in some judgments in which the word "collision" has been used in a general way in relation to the impact of a ship against another object, and to some other cases which have only an indirect bearing on the present case; but in my opinion little assistance is to be derived from these references.

(1) [1893] A. C. 468.

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I may here observe that the true meaning of collision is not a mere striking against, but a striking together; and to me it seems more correct to speak of a vessel stranding, or running, or striking upon or against rocks or the shore, than colliding therewith; and the same to my mind is true when the contact is by a vessel with some structure erected on the rocks or shore, and I notice that the use of the word "collision" in ss. 418 and 419 of the Merchant Shipping Act, 1894, appears to refer only to collisions between ships. (1)

If this matter were clear of all that has been said in other cases, the question would appear to me to be a simple matter of construction, and having regard to the object of the Act of 1868, and its general scope, and the ordinarily understood

(1) In *Richardson* v. *Burrows*, tried at the Guildhall on December 16, 1880, by Lord Coleridge C.J. and a special jury, the question was whether the schooner *Ariel* came into collision with something which caused damage to the ship, and consequent damage to the cargo of wheat, within the meaning of the following warranty in the margin of a Lloyd's policy: "Warranted free from particular average unless the ship or craft be stranded, sunk, in collision, or on fire, each craft or lighter to be deemed a separate insurance, but to pay landing, warehousing, forwarding, and special charges, should the same be incurred, as well as partial loss arising from transhipment. General average payable according to foreign statement if made up. The collision to be of such a nature as may reasonably be supposed to have caused or have led to the damage of cargo."

From the transcript of the shorthand writer's notes, supplied the reporter by Messrs. Waltons, Johnson, Bubb & Whatton, solicitors for the defendants, it appears that evidence given by the plaintiffs established that the starboard fore bilge was damaged by the schooner passing over or through some floating wreck. The jury were by consent discharged, and the case left to go to the Court of Appeal with power to draw inferences of fact, on the learned judge's ruling that, "I shall hold in this memorandum it means collision with another ship, and does not mean either rock or sandbank or floating wreck or anything, but the ordinary meaning in my judgment of collision." The plaintiffs did not appeal, and the defendants had final judgment.

In *Hough* v. *Head*, (1885) 5 Asp. M. L. C. 447, Grove J. said (p. 450): "Collision appears to me to contemplate the case of a vessel striking another ship or boat, or floating buoy, or other navigable matter, something navigated, and coming into contact with it. It, so to speak, imports as it were two things. It may be that one is active and the other is passive, but still in one sense they each strike the other." See further, as to "in collision" in the memorandum of a policy, *London Assurance* v. *Companhia de Moagens*, (1897) 167 U. S. 149. T. L. M.

meaning of the words "damage by collision" in the Admiralty Court, where the term "causes of damage" is the general expression for damage cases, I should come to the conclusion that the word "collision" referred to collision between ships. This opinion is in accordance with the case of *Everard* v. *Kendall* (1) and *Robson* v. *Owner of the Kate* (2), and there is nothing of substance to conflict with this view unless the argument based on the case of *The Zeta* (3) does so.

That argument comes to this: that the Admiralty Court had jurisdiction in 1868 in causes of damage received by or done by a ship which included a case of the present kind, and that the Act of 1868 gave similar jurisdiction to the county courts within a limited amount; but, in my opinion, that argument seeks to establish too much.

It has been decided in several cases that the County Court Acts of 1868 and 1869, while conferring Admiralty jurisdiction upon county courts up to certain limited amounts, conferred no greater jurisdiction, except with regard to charterparties, than was possessed by the Admiralty Court: see *The Dowse* (4), *Allen* v. *Garbutt* (5), and *Reg.* v. *Judge of the City of London Court.* (6) The arguments and judgments in these and other cases shew that the question has in such cases not really been whether the particular claim came within the ordinary meaning of the words of the County Court Acts, but whether the claim was one in respect of which the Admiralty Court had jurisdiction, and, if not, it was considered that it could not have been intended to confer Admiralty jurisdiction in such a case on the county courts, as these Acts were to confer Admiralty jurisdiction, though s. 2 of the Act of 1869 in certain matters gave a somewhat wider jurisdiction: see *The Alina* (7); and I am not aware whether the words "damage to cargo," in sub-s. 3 of the Act of 1868, have yet been considered: see *The Victoria.* (8)

So also in *The Zeta* (3) the real question was not whether

(1) L. R. 5 C. P. 428.
(2) 21 Q. B. D. 13.
(3) [1893] A. C. 468.
(4) (1870) L. R. 3 A. & E. 135.
(5) (1880) 6 Q. B. D. 165.
(6) [1892] 1 Q. B. 273.
(7) (1880) 5 Ex. D. 227.
(8) (1887) 12 P. D. 105.

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the claim fell within the ordinary meaning of the words of s. 4 of the Act of 1869, or as to the meaning of the word "collision," but whether the words of s. 4 should have a restricted interpretation on the ground, as was contended, that the case was not within the jurisdiction of the Admiralty Court. It was held, however, in the House of Lords, overruling the Court of Appeal, that the case was within the jurisdiction of the Admiralty Court, and thus any difficulty in the construction of the Act of 1869 was removed.

In the present case the difficulty does not arise upon any question as to the jurisdiction of the High Court. It is clear from the terms of the Admiralty Court Act, 1861, and the decisions thereon, that the High Court has Admiralty jurisdiction in respect of this claim as being damage done by a ship: see *The Uhla* (1); *The Excelsior* (2); but the question is whether the wording of the Act of 1868 is sufficient to give similar jurisdiction to the county court within the limited amount in such a case.

Now it is quite clear that the Acts of 1868 and 1869 do not give Admiralty jurisdiction within the limited amounts in all cases in which the Admiralty Court has jurisdiction. For instance, no jurisdiction is given in causes of possession, co-ownership cases, mortgage or bottomry, and it cannot, therefore, be inferred that the county courts were intended to have Admiralty jurisdiction in all Admiralty causes up to limited amounts. On the contrary, care is taken to specify exactly what causes may be brought in the county court.

Whatever the old Admiralty jurisdiction was at the time when the Act of 1868 was passed, the Acts of 1840 and 1861 had enacted that the High Court of Admiralty should have jurisdiction over all claims for "damage received by any ship or sea-going vessel," and "over any claim for damage done to any ship," and nothing would have been easier than to have used similar words in the County Court Act of 1868, whereas the words adopted in that Act are "damage by collision."

We have only, therefore, to consider what is included in these words. All cases of damage done by a ship cannot, in my

(1) L. R. 2 A. & E. 29, n. (2) (1868) L. R. 2 A. & E. 268.

opinion, be so included. It has been held, for instance, that injury to a diver who was caught by the paddle-wheel of a steamer: *The Sylph* (1), approved in *The Beta* (2), which, however, was dissented from in the case of *Smith* v. *Brown* (3); damage done to a cable in freeing it from a vessel's anchor by which it had been fouled: *The Clara Killam* (4); and damage to a vessel through grounding to avoid another vessel owing to negligence in the navigation of the other vessel: *The Industrie* (5), could be sued for in the Admiralty Court; but clearly these cases could not properly be called cases of damage by collision. Other illustrations may be put analogous to the last case, though probably they are rather cases of damage received by a ship than of damage done by a ship.

Possibly the plaintiff's argument need not be put so high as to include in damage by collision all cases of damage done by a ship, but only cases of damage done by one ship to another, or by a ship to some other object by striking against it; but even then the word "collision" in the ordinary meaning and as ordinarily used and understood in the Admiralty Court would not be properly applicable to the latter case. Cases of striking something which is not engaged in navigation are very rare, and it is not unreasonable to assume that in using the word "collision" the framers of the Act intended to deal with the class of case which forms the ordinary subject of a collision suit. It was urged that it would be strange if, as held in *The Zeta* (6), the owner of a pier or dock could be sued in the county court for damage caused to a ship by the negligence of the servants of such owner, and yet that such owner could not in the county court sue for damage to the structure by negligence on the part of the ship's people; but the answer appears to be that the amending Act of 1869 covers the one case but not the other.

The collocation of the words "damage by collision" and "damage to cargo" in the sub-section to my mind also tends to shew that the sub-section was only dealing with ships,

(1) (1867) L. R. 2 A. & E. 24.
(2) (1869) L. R. 2 P. C. 447.
(3) (1871) L. R. 6 Q. B. 729.
(4) (1870) L. R. 3 A. & E. 161.
(5) L. R. 3 A. & E. 303.
(6) [1893] A. C. 468.

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though what is included in "damage to cargo" is not a subject for present consideration.

For these reasons I am of opinion that the writ of prohibition must go, and that the applicants are entitled to their costs of this motion against the respondent.

Solicitors for applicants (defendants): *Botterell & Roche, for John R. Richards, Swansea.*

Solicitors for respondent (plaintiff): *Ffinch & Chanter, Barnstaple.*

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Admiralty—Collision—Damage—Freight—Abandonment of Voyage—Claim by Cargo Owner—"Substituted Expense."

A collier from the Tyne to Cape Town, under charter to the Admiralty, came into collision with a steamship in the English Channel and put back to the Thames for repairs. The cargo of coals had to be discharged, and, by arrangement between the Admiralty, as the owners of the cargo, and the owners of the collier, the voyage was treated as abandoned, the cargo sold, and a sum of 1000*l.* agreed to be paid by the Admiralty to the owners of the collier as a "substituted expense" in lieu of the larger sum which, it was estimated, would have been incurred for storage and reshipment if the collier had carried on the coals at the end of the six weeks required for repairs.

At the usual ships' reference, after a decree of both to blame, a moiety of the claim by the owners of the collier for repairs and detention was paid by the owners of the steamship; but at a reference between the Admiralty and the owners of the steamship a claim, made by the Admiralty against the owners of the steamship for their adjusted proportion of the 1000*l.*, was disallowed by the registrar. On objection to the report:—

Held, by Bucknill J., affirming the report of the registrar, that the amount claimed by way of "substituted expense" was not such a consequence of the collision as to render the owners of the steamship liable for their proportion as wrong-doers.

MOTION in objection to the report of the assistant registrar, disallowing a claim by the Commissioners for executing the office of Lord High Admiral of the United Kingdom of Great Britain and Ireland, owners of cargo laden on board the steamship *Uskmoor*, against the defendants, the owners of the steamship *Minnetonka*.

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The material facts were shortly as follows :—

On May 15, 1902, the Admiralty chartered the *Uskmoor*, a steamship of 3587 tons gross register, to carry a cargo of about 4460 tons coals from the Tyne to Cape Town, the owners of the vessel to receive one-third of the freight of 16*s.* per ton, if required, less 3 per cent., by draft at three days' sight upon the Accountant-General of the Navy on signing bills of lading.

In pursuance of this charter the *Uskmoor* was, on June 9, proceeding down the English Channel when she came into collision, off Beachy Head, with the steamship *Minnetonka*, and was so seriously damaged that she had to jettison forty to fifty tons of cargo and put back to the Thames. On her arrival there on June 11 the surveyor for her owners reported that it would be necessary to dry-dock the vessel, and, for that purpose, to discharge the whole of the cargo. On the same day the managing owners of the vessel by letter informed the Director of Navy Contracts of the opinion of the surveyor, and added that it was estimated that the repairs would take about six weeks. To this letter the Director of Navy Contracts replied that "it would be necessary to consider the advisability of selling the coal and considering the voyage terminated, so as to avoid the expense of storage and reshipping." On June 13 the managing owners wrote, giving particulars of the probable cost of discharging, storing, and reshipping the cargo, and adding that "the owners are quite prepared to carry out the voyage and earn their freight when the repairs are completed; but if you wish to terminate the voyage now . . . . (the owners) would do so for the consideration of 7*s.* 6*d.* per ton as full freight." On June 17 the Admiralty surveyor wrote to the Director of Navy Contracts that the managing owners would now accept 1000*l.* in respect of the freight, which is a trifle more than the average adjusters had advised, and adding, "All that is wanted now from you is a letter to" (the managing owners) "stating that you offer them 1000*l.* in respect of the freight, and stating that you will give them another cargo to replace the present one at the 16*s.* rate, or more if freights should rise."

On the same day the average adjusters wrote to the Director

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of Navy Contracts that the salvage association, representing the underwriters on steamer, had agreed to the proposal "to terminate the voyage and pay the shipowners 4*s.* 6*d.* per ton, which amount is to be apportioned as a substituted expense over all interests of ship, cargo, and freight." On June 18 the Director of Navy Contracts wrote to the managing owners that "to minimise loss in the interests of all concerned the Admiralty is prepared to agree to the following arrangement, to which it is understood that you and the underwriters have given your concurrence, viz., the voyage to be terminated and the coal sold, the owners to be paid the sum of 1000*l.*, to be apportioned as a substituted expense in lieu of those which would otherwise have been incurred." The further correspondence is set out in the judgment, and, in the result, the Admiralty, in consideration of the voyage being abandoned, agreed to pay the shipowner 4*s.* 6*d.* per ton, or 996*l.* 15*s.*, subsequently increased to 1000*l.*, in lieu of incurring an estimated expense of 1195*l.* 18*s.* 4*d.*, made up of 664*l.* 10*s.* for hire of barges for storage of about 4430 tons of coals for six weeks; 106*l.* 17*s.* 6*d.*, cost of shifting the cargo; and 424*l.* 10*s.* 10*d.* for reshipping. The total sum when apportioned working out as follows: general average, 219*l.* 11*s.* 3*d.*; cargo, 332*l.* 5*s.*; freight, 644*l.* 2*s.* 1*d.*; and, substituting 1000*l.* as the total sum, the apportionment would be: 183*l.* 11*s.* 10*d.*, to be paid by the owners or underwriters on ship in respect of general average; 538*l.* 11*s.*, to be paid by the underwriters on freight; leaving 277*l.* 16*s.* 4*d.* to be paid by the Admiralty in respect of the cargo.

Cross-actions of damage by collision were commenced by the owners of the two vessels. These were consolidated, and, at the trial on July 9, both vessels were found to have been in fault. (1)

At the usual ships' reference, a counter-claim was put in by the owners of the *Uskmoor*, as defendants, and, on December 22, allowed by the registrar, which included 716*l.* in respect of discharging cargo, 590*l.* in respect of expenses before collision, and 1120*l.* in respect of demurrage, or 2426*l.* in respect of

(1) See *The Uskmoor*, [1902] P. 250.

these three items, a moiety of which, under the decree of both to blame, was paid by the plaintiffs, the owners of the *Minnetonka*.

On April 29, 1903, the Admiralty issued a writ against the owners of the *Minnetonka* claiming, as owners of the cargo laden on board the *Uskmoor*, damages in respect of the collision, and on April 30 a settlement was arrived at on the terms of the defendants paying 50 per cent. of the plaintiffs' damages, to be assessed by the registrar and merchants.

The claim filed in the registry by the Admiralty, as owners of cargo ex *Uskmoor*, against the owners of the steamship *Minnetonka*, consisted of two items, namely—(1.) 447*l.* 1*s.* 2*d.*, the difference between the cost (2440*l.* 11*s.* 2*d.*) and the selling price (1993*l.* 10*s.*) of the coal, and (2.) 1000*l.*, being the amount agreed to be paid by the Admiralty to the owners of the *Uskmoor* in view of the voyage being abandoned in London.

On June 12 the assistant registrar reported that the first item of the claim, consisting of the difference between the cost of the coal and the price realized, had been disallowed—with the exception of a moiety of 5*l.* 5*s.* recoverable against the defendants for cost of surveys—on the ground that the cargo owners had not acted with reasonable diligence in not accepting a better price than that ultimately obtained; and with regard to the second head of the claim, which was for 1000*l.* agreed to be paid by the Admiralty to the shipowner for abandoning the voyage, the report proceeded: "It is not clear from the evidence that the whole of this sum was to be paid. In our view of the case, however, this doubt is not material, for we are of opinion that, under all the circumstances, the reasonable and businesslike course for all parties was for the cargo to be sold in the Thames, and the payment of any sum to the shipowner by the cargo owner was not a consequence of the collision for which the wrong-doer is liable. The shipowner has recovered from the wrong-doer the cost of repairs and damages for the detention of his ship; and at the end of the period of detention he was in a position to, and did, take up a fresh charter. The duty of the shipowner being to carry the cargo to its destination, it was to his advantage to make arrangements with the

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cargo owners whereby he would be free from this duty and be able to take a new cargo when the repairs were finished—any payment, therefore, made by the cargo owners to the shipowners is not a natural and reasonable result of the collision—and, therefore, is not recoverable against the wrong-doer."

On July 13 a motion on behalf of the Admiralty to vary the report, so far as the second head of the claim was concerned, came on before Bucknill J., when, after argument, the learned judge referred the report back to the assistant registrar to ascertain whether any part of the sum of 276*l.* 18*s.* 4*d.* (277*l.* 16*s.* 4*d.*), a moiety of which was claimed by the cargo owners, had been already allowed to the owners of the *Uskmoor* in their claim against the *Minnetonka*.

On November 20 the assistant registrar further reported that as "on the claim of the *Uskmoor* only the actual expenses incurred for discharging the cargo and for the hire of barges were allowed, no part of the present claim had been dealt with in the ship's reference," though all sums in respect of loss of freight and for expenses at the port of loading were allowed to the shipowners. The report further found (1.) that the voyage was not commercially at an end, and (2.) that on June 18 the repairs were expected to take six weeks; (3.) that 1000*l.* was agreed to be paid on the terms contained in the letter of June 18, explained by the letters of June 19 and 20; (4.) that the solicitor for the owners of the *Uskmoor* stated that the Admiralty, as cargo owners, would be called upon to pay their share; (5.) that it was reasonable and for the benefit of all concerned that the voyage should be abandoned, so that there might be no risk of the deterioration of the cargo; but that "the agreement by the Admiralty to pay 1000*l.*, or a part thereof, was not a reasonable agreement, because the object of the abandonment of the voyage was to save future expenses, and it was unreasonable for the cargo owners to pay any sum to the shipowners, since [? because] it was the duty of the shipowners to take all measures necessary to enable them to carry the cargo to its destination, and, as the voyage was not commercially at an end, the cargo owners could have insisted on their cargo being carried to its destination without any payment to

the shipowners except that of the agreed freight. We further find that the agreement, so far as it relates to the payment of 1000*l.*, or any part thereof, was one arising out of the relation between ship and cargo, and that the collision was not the cause of it; and that the sum claimed is inadmissible as a head of damage in an action against the wrong-doing ship." The report further found that "in December, 1902, the owners of the *Uskmoor* recovered from the owners of the *Minnetonka* a complete indemnity for all damages actually incurred arising out of the collision," and that "that indemnity was obtained on the basis of the voyage being abandoned, and included all loss of expenses and all loss of profits from the date of eleven days before the collision when the *Uskmoor* commenced her voyage by bunkering in the Tyne."

1904. Feb. 16. *Acland, K.C.*, in support of the motion in objection to the report of the registrar. The sum of 1000*l.* agreed to be paid by the Admiralty to the owners of the *Uskmoor* was in consideration of the abandonment of the voyage in London, and as such was a liability consequent on the collision. The figures, when adjusted, work out at 277*l.* 16*s.* 4*d.*, for only a moiety of which, in accordance with the decision in *The Milan* (1), the owners of the *Minnetonka* are liable, as being their proportion of the "substituted expense," which represents the loss which would have been incurred by the storage of the coal and incidental expenses until it could be reshipped and carried on.

At the time of the collision the *Uskmoor* was under charter to carry the coal to Cape Town. She was not damaged beyond repair, and there were facilities, expensive no doubt, for discharging and storing the coal in London. The owners of the *Uskmoor* were, therefore, in a position to insist on reloading the cargo and carrying it to its destination so as to earn their freight. This distinguishes the case from *Jackson* v. *Union Marine Insurance Co.* (2), where the charterers were held not bound to load the ship, the jury having found that the time

(1) (1861) Lush. 388. (2) (1874) L. R. 10 C. P. 125.

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required for repairs, about eight months, was so long as to put an end in a commercial sense to the adventure. The Admiralty, therefore, was not in a position to throw up the charter, and apart from contract would, as cargo owners, have been entitled to recover the actual damage sustained by, and the expenses incurred in respect of, the cargo as losses falling on cargo, the direct result of the collision. The Admiralty cannot be in a worse position because it enters into an agreement beneficial to all concerned for the sale of the cargo and the abandonment of the voyage, so as to reduce the loss which would have been occasioned had the parties insisted on their strict rights to complete the voyage.

In the second report it is stated that it was unreasonable for the cargo owner to pay any sum to the shipowner, because it was "the duty of the shipowner to take all measures necessary to enable him to carry on the cargo to its destination"; and Carver's Carriage by Sea, s. 302, is cited as an authority for that proposition; but the learned text-writer is only dealing with the obligation upon the master, as representing the shipowner, to do all that he can in a port of refuge to repair and complete the voyage, so as to carry out the contract with the cargo owner. He is not dealing with the case where, in order to minimise the loss, it may be in the interest of the cargo owner and of all concerned that the voyage, instead of being completed, should be abandoned on terms, and the claim against the *Minnetonka* rests on the agreement made with that object in view.

[The cases of *Notara* v. *Henderson* (1) and *Svendsen* v. *Wallace* (2) were referred to.]

Aspinall, K.C., and *Arthur Pritchard*, contra. This Court has nothing to do with arrangements between the parties; it looks only at the position of shipowner and cargo owner in respect of actual loss directly resulting from the collision. These actual losses were dealt with at the ship's reference when the owners of the *Uskmoor* filed their claim for a moiety of their damage, including the loss of the use of the ship during

(1) (1872) L. R. 7 Q. B. 225. (2) (1885) 10 App. Cas. 404.

the time she was under repair, and including any claim by the owners of the *Uskmoor* against the owners of the *Minnetonka* in respect of the cargo. The amount of this claim was paid by the owners of the *Minnetonka*.

In *Jackson* v. *Union Marine Insurance Co.* (1) the contract between the owner of the goods and the shipowner came to an end. Here it was thought better to bring it to an end, and the expenses which it is alleged were minimised are purely hypothetical. On the completion of the repairs the *Uskmoor* took another cargo for the Admiralty in place of that sold in the Thames, and this was part of the terms of the agreement with reference to the 1000*l.*

The Court allows the shipowner, in addition to the loss of the use of his ship, something extra in respect of any special beneficial contract he may have entered into; but counsel for the Admiralty want to go outside the rule and recover what is called a "substituted expense"—that is to say, an attempt is made, as was ineffectually done in the case of *The Marpessa* (2), to make the wrong-doer pay more than the total amount of the actual damage caused.

Acland, K.C., in reply. It was the duty of the owner of the carrying ship on the one hand, and of the Admiralty on the other, to take such steps as were prudent and within their power to mitigate the loss which resulted from the action of the wrong-doer. The Admiralty, therefore, acted reasonably in reducing the amount to 1000*l.* from 1195*l.*, which was a low estimate of the costs connected with the storage of the coal, for the repairs in fact lasted eight weeks, so that the shipowner could have forced the Admiralty to incur the loss of another 400*l.*, beyond the 1195*l.*, before the cargo was reshipped. Secondly, it is said that the owners of the *Uskmoor* have received a complete indemnity for all damage arising out of the collision, and, therefore, as the owners of the *Uskmoor* could not claim from the owners of the *Minnetonka* any further sum for the abandonment of the voyage, the Admiralty could not do so; but it is submitted that the fact that the owners of the *Uskmoor* may have received from the owners of the *Minnetonka*

(1) L. R. 10 C. P. 125. (2) [1891] P. 403.

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a full indemnity, so far as they as shipowners are concerned, does not prevent the cargo owner having a claim in respect of his losses and expenses against the wrong-doer.

Thirdly, a subsidiary point is taken in the report of the assistant registrar, apparently on the authority of *The Marpessa* (1), that, if the owners of the *Uskmoor* recovered from the Admiralty the amount claimed by the Admiralty against the *Minnetonka*, the owners of the *Uskmoor* would have to deduct that amount from the sum awarded to them in their claim against the *Minnetonka*; but again it is submitted that the Admiralty is not concerned with the accounts between the owners of the two ships as settled at the ship's reference, to which the Admiralty was not a party.

BUCKNILL J. This is a motion by way of appeal from the report of the registrar, on the ground that that report cannot be supported in law. The matter has been before the Court on two occasions. On the last occasion the Court referred the matter back to the registrar to find whether any part of the amount claimed by the Admiralty, namely, 277*l.* 16*s.* 4*d.*, had in fact been allowed to the *Uskmoor*, in the reference between the owners of the *Uskmoor* and the owners of the *Minnetonka*, for the damage sustained by the *Uskmoor* in consequence of a collision between those two ships, for which they were found both to blame.

The registrar has found that this amount has not been dealt with in that reference, and it is now necessary to go through the story of the case in order to get clearly at the facts. The *Uskmoor* was on a voyage from the Tyne to South Africa, laden with a cargo of coal, the property of the Admiralty. During that voyage she came into collision with the *Minnetonka*, in consequence of which the *Uskmoor* was damaged, and also to a certain extent, the cargo on board. The *Uskmoor* was then taken to the river Thames to be repaired, and when it was ascertained that the repairs would take some time—it was estimated about six to eight weeks—the Admiralty and the owners of the *Uskmoor* very properly consulted together to see

(1) [1891] P. 403.

what could be done in the circumstances for the benefit of each other. The Admiralty in the first instance suggested that the voyage should be abandoned. They as charterers would have been contributors to the general average which would have had to be made up in the long run, and on June 12 the Admiralty wrote to the owners of the *Uskmoor* asking them what arrangements they had made with regard to the storage of the cargo on shore or in lighters during the repairs to the ship. The letter ended with this paragraph: "Until the receipt of the surveyor's report it will not be possible to form a definite opinion as to the best course to pursue; but I should be glad to have your views as soon as possible as to the advisability of selling the coal and considering the voyage terminated, so as to avoid the expense of storage and re-shipping." The expense of reshipping would not fall entirely upon the cargo owners, but the expense of storage, subject to general average, would so fall. That letter was answered by the owners of the *Uskmoor* on June 13, when they said the repairs would take about eight weeks, and it was impossible for them to advise the Admiralty as to the termination of the voyage, but that if the Admiralty wished to do so they (the owners of the *Uskmoor*) would agree for the consideration of 7*s.* 6*d.* per ton "as full freight." Then on June 17 their surveyor writes to the Admiralty that the managing owners "will now accept 1000*l.* in respect of the freight," which is a trifle more than the average adjusters had advised. "They had written their letter to you before they could make sure whether it was 996*l.* or 1000*l.* All that is wanted from you now is a letter to the managing owners stating that you offer them 1000*l.* in respect of the freight, and stating that you will give them another cargo to replace the present one at the 16*s.* rate or more if freights should rise in the meantime, of course they giving you proper and sufficient notice when the vessel is expected to be ready, and the managing owners to have the option of refusing the offer." On the same day the average adjusters wrote to the secretary of the salvage association, and they put the case in this way: "We beg to inform you that we have carefully considered the facts and circumstances

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of this case, and assuming the voyage is terminated in London and the shipowners are paid 4*s.* 6*d.* per ton, equal 996*l.* 15*s.*, this amount will be apportioned as per annexed sheet as a substituted expense in lieu of hire of barges: six weeks 664*l.* 10*s.*, shifting ditto 106*s.* 17*s.* 6*d.*, reshipping cargo 424*l.* 10*s.* 10*d.*, total 1195*l.* 18*s.* 4*d.*; and in addition to the above expenses which will be saved, the expected deterioration by breakage of coal, estimated by the Admiralty surveyor at about 10 per cent. at least on Cape Town values, and 2 per cent. for loss of weight, is avoided. It will, of course, be necessary to obtain the agreement of all interests to this arrangement." Then the secretary of the salvage association wrote on June 18 to the average adjusters: "The ship underwriters have approved our suggestion that the coals should be sold in London, and that the loss of freight should be treated as a substituted expense." The keynote of this case is that the loss of freight should be treated as a substituted expense. Then comes the letter of June 18, setting out the figures of general average and freight, and there is the final and important letter from the Admiralty, on June 20, to the managing owners: "Your expression 'to pay the shipowners the sum of 1000*l.*' is understood as meaning that the sum of 1000*l.* will be apportioned on the basis stated in my letter of June 18, and a claim made by the owners upon the Admiralty for the portion thereof falling upon the cargo when the general average adjustment is completed."

Now, when this case first went before the registrar and merchants it was put in this way: That the shipowners and the Admiralty had agreed that the sum of 1000*l.* was to be paid for freight. It is so mentioned in the shorthand writer's notes, which I have before me. To-day the claim is not for freight at all. It is not put as having anything to do with freight. That part of the case has been put on one side. It put in this way: That the Admiralty have entered into an obligation, binding upon them, to pay to the owners of the ship 277*l.* 16*s.* 4*d.*, and that there was a good consideration for that binding contract between them for the abandonment of the voyage. When I come to test the claim, to see what it really means, I find that it is put in this way: If the voyage

had not been abandoned, and if the cargo had remained in barges, and if the Admiralty had become responsible to pay, as they would have become, for the hire of the barges, the amount would certainly have exceeded the sum I have mentioned. It may be that this is a sum of money which, in the circumstances of this case, the shipowners could recover from the Admiralty—I do not say it would or would not be so—but it does not follow that, because the Admiralty would be liable to the shipowners, therefore the Admiralty can put that liability over on to the owners of the *Minnetonka*, the wrong-doing ship. The only way in which the Admiralty can recover against the owners of the *Minnetonka* here is by shewing a certain loss, or a sum of money lost; that is, a certain loss, or a substituted figure less than the loss, in consequence of a reasonable arrangement by the person having a claim minimising the claim which he has against the wrong-doer; but it must be a loss and a liability arising directly in consequence of the wrong-doing act of the *Minnetonka*. If it is not, then it is not recoverable.

There is no real contradiction as to the facts as I find them to be. There is the abandonment of the voyage; and as between the owners of the *Uskmoor* and the owners of the cargo, an agreement to pay a sum of money. It is said now that that sum of money is a sum for which the Admiralty would have been liable in an event which has not in fact occurred. It is said to be a sum of money which, in the circumstances which have arisen, represents directly a loss by the Admiralty occasioned by the wrong-doing of the *Minnetonka*. I think all these suggestions are not in accordance with the actual facts—that what really has happened is this, that the parties have consulted together and come to some hypothetical figure not based upon fact, and not representing a direct loss or damage by the Admiralty in consequence of the wrong-doing of the *Minnetonka*; and that, therefore, the Admiralty cannot make good this claim as against the owners of the *Minnetonka*. But there is something else, which, though not absolutely conclusive, is very important to be considered, and that is that this sum of 277*l.* 16*s.* 4*d.*, if the Admiralty could make

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the owners of the *Minnetonka* pay it, would be payable to the *Uskmoor*, and the owners of the *Uskmoor* have already been paid all the loss they have sustained in consequence of the collision; and although it is possible to conceive a case where the owners of a ship may make a profit by the wrong-doing of the other party, in this case I think the owners of the *Uskmoor* would not be entitled to make such a profit, although that would not be an answer by the Admiralty if the Admiralty had undertaken, for good consideration, to pay a sum of money to the owners of the *Uskmoor*.

In conclusion, it seems to me that this case fails, because it has not been made out in law or in fact to be a loss sustained by the Admiralty directly in consequence of the wrong-doing of the *Minnetonka*. My judgment must, therefore, be against the appellants, and I confirm both reports of the registrar, with the result that the defendants, the owners of the *Minnetonka*, must have the costs of this appeal, and also of the second reference.

Solicitor for the Admiralty: *The Treasury Solicitor.*

Solicitors for defendants, the owners of the *Minnetonka*: *Pritchard & Sons.*

T. L. M.

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Feb. 29;
March 1, 2, 14, 15, 16.

*Admiralty—Compulsory Pilotage—Vessel passing through Port of Liverpool—Limits of Port—Port of Manchester—*8 *Anne, c. viii., s.* 3*—Mersey Dock Acts Consolidation Act,* 1858 (21 *&* 22 *Vict. c. xcii.*), *s.* 128*—Manchester Ship Canal Act,* 1885 (48 *&* 49 *Vict. c. clxxxviii.*), *ss.* 3, 211*—Merchant Shipping Act,* 1894 (57 *&* 58 *Vict. c.* 60), *s.* 605*—Mersey Docks (Pilotage, &c.) Act,* 1899 (62 *&* 63 *Vict. c. clxxii.*), *ss.* 3, 4, 5*—Costs.*

The defendants' vessel, inward bound from the sea to Manchester, after anchoring in the Mersey to wait for the tide, was proceeding through the Eastham Channel when she came into collision, near No. 4 buoy, with the plaintiffs' vessel. In an action of damage by collision, the pilot of the defendants' vessel was found alone to blame:—

Held, by Gorell Barnes J., that pilotage was compulsory, and, therefore, the defendants were not liable, for, under the Mersey Dock Acts Consolidation Act, 1858, the master of every vessel, other than a coaster in ballast, or under the burthen of one hundred tons, entering the port of Liverpool from the sea, is under an obligation to employ a pilot, and, if the vessel is proceeding to the port of Manchester, viâ the Ship Canal, the duties of the pilot continue until the vessel reaches Eastham.

Semble, every vessel, with the same exemptions, outward bound from the Manchester Ship Canal, is under compulsory pilotage on leaving the canal at Eastham.

ACTION of damage by collision.

The plaintiffs were the owners of the *Bifrost*.

The defendants, and counter-claimants, were the owners of the *Mercedes de Larrinaga*.

The case is reported on the question whether the *Mercedes de Larrinaga*, inward bound from a foreign port to Manchester, was, whilst proceeding through the Eastham Channel to the Eastham Locks of the Ship Canal, in charge of her Liverpool pilot by compulsion of law. This question involved the consideration of the sections of the Mersey Dock Acts Consolidation Act, 1858, relating to pilotage, and of the other Acts noted below. (1)

(1) (1709) 8 Anne, c. viii. (commonly quoted as c. xii.): An Act (to be taken as a publick Act) for making a convenient dock or bason at Leverpoole for the security of all ships trading to and from the said port of Leverpoole —s. 3, (dealing with the rates to be paid by the masters or owners of vessels) "trading or coming into or out of the said port with any goods or

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The material facts were shortly as follows :—

On December 21, 1903, about 2 P.M., a collision occurred near No. 4 buoy in the Eastham Channel of the river Mersey between the *Bifrost*—a Swedish screw steamship of 2122 tons gross register, from Skutskar to Manchester with a general cargo—and the *Mercedes de Larrinaga*, a screw steamship belonging to the port of Liverpool of 4154 tons gross register, from Galveston to Manchester with a cargo of cotton. Both vessels had previously been at anchor in the Mersey waiting for the tide, and both were in charge of duly licensed Liverpool pilots.

On February 29 and March 1, the action brought by the

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merchandize (the limits and extent whereof are as far as a certain place in Hoyle-Lake called the Redstones, and from thence all over the river Mersey to Warrington and Frodsham Bridges). . . ."

The Mersey Dock Acts Consolidation Act, 1858 (21 & 22 Vict. c. xcii.): An Act to consolidate and amend the provisions of the several Acts relating to the Liverpool and Birkenhead Docks, and the port and harbour of Liverpool, and for other purposes connected therewith. The material sections are set out in the judgment.

The Upper Mersey Navigation Act, 1876 (39 & 40 Vict. c. civ.). The Manchester Ship Canal Act, 1885 (48 & 49 Vict. c. clxxxviii.): An Act to authorize the construction of a ship canal to Manchester, and for other purposes. The material sections are sufficiently referred to in the judgment.

The Manchester Ship Canal (Alteration of Works) Act, 1888 (51 & 52 Vict. c. clxi.): An Act to alter certain works authorized by the Manchester Ship Canal Act, 1885, and to alter the boundaries between the townships of Stretford and Salford, and the borough of Salford and the district of the local board of Stretford, and for other purposes.

Treasury warrant, December 18, 1893, relating to the limits of the ports of Liverpool and Manchester, published in the *London Gazette*, January 2, 1894, under the authority of the Customs Consolidation Act, 1876 (39 & 40 Vict. c. 36).

Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 605: "(1.) The master and owner of any ship passing through any pilotage district in the United Kingdom on a voyage between two places both situate out of that district, shall be exempted from any obligation to employ a pilot in that district, or to pay pilotage rates when not employing a pilot within that district.

"(2.) The exemption under this section shall not apply to ships loading or discharging at any place situate within the district, or at any place situate above the district on the same river or its tributaries."

The Mersey Docks (Pilotage, &c.) Act, 1899 (62 & 63 Vict. c. clxxii.): An Act to make further provision with reference to the employment of pilots in the port of Liverpool, and for other purposes.

plaintiffs, the owners of the *Bifrost*, against the defendants, the owners of the *Mercedes de Larrinaga*, was tried by Gorell Barnes J., assisted by two of the Elder Brethren of Trinity House, and resulted in a decree that the collision was due to the negligent navigation of the *Mercedes de Larrinaga*, but that the pilot of that vessel was solely to blame. The question raised by the following plea was then argued: "Alternatively, if the said collision was caused by the negligent navigation of the *Mercedes de Larrinaga* (which is denied), the same was occasioned solely by the fault or incapacity of a qualified pilot acting in charge of the said ship within a district where the employment of a qualified pilot was compulsory by law, and the defendants are not answerable for any loss or damage caused thereby."

March 2, 4, 14, 15. *Aspinall, K.C.*, and *Lewis Noad*, for the plaintiffs, the owners of the *Bifrost*. Though the Court has found that the collision was due to the fault of the pilot alone of the *Mercedes de Larrinaga*, her owners are nevertheless liable on the ground that the employment of the pilot was not compulsory at the time and place in question.

The pilotage of the port of Liverpool is regulated by the Mersey Dock Acts Consolidation Act, 1858, under which the Mersey Docks and Harbour Board is constituted the pilotage authority, with power to license pilots, and the sections of the Act dealing with the duties of pilots are framed with reference to the course of business at Liverpool, which is for vessels to load and discharge their cargoes in the wet docks of the port. By s. 128 it is the duty of the pilot in charge of an inward bound vessel to bring her to an anchor, if need be, in the river Mersey, and then pilot her into some one of the wet docks within the port of Liverpool. Sects. 129, 130 detail the duties of, and penalties on, the master of the vessel in respect of this pilotage; but they do not cover the present case, as the vessel was bound to Manchester and not into a wet dock within the port of Liverpool.

Secondly, assuming that the vessel was under compulsory pilotage when she entered the port of Liverpool, that compulsion

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ceased on her being brought by the pilot to an anchor, as she was not proceeding to a wet dock in the port of Liverpool. In *The Servia and Carinthia* (1) the sections of the Act of 1858 relating to pilotage were discussed at length, and the effect of the judgment was to shew that there was no obligation to employ a pilot when a vessel was changing docks or crossing from the docks on one side of the river to those on the other, or was being navigated in the port when not inward bound, and though inward bound she would only be under compulsory pilotage, after anchoring, if she was in course of progress to her dock—that is, the rates of pilotage were fixed for inward bound vessels from sea to dock, and, if need be, for anchoring them in the river till they could be docked. It was held in that case that the employment of the pilot by compulsion of law ceased, or was suspended, as soon as an inward bound vessel deviated to a stage from the route which she would otherwise follow to the dock. In consequence of that decision certain sections (3, 4, and 5) were inserted in the statute of 1899; but though they provide for the difficulties suggested by the judgment in that case, in respect of the extra duties performed by pilots, they do not cover the present case, which is that of an inward bound vessel passing through the port of Liverpool on her way from a foreign port to Manchester.

Thirdly. This vessel comes within the exemption from compulsory pilotage contained in s. 605 of the Merchant Shipping Act, 1894, as she was passing through a pilotage district in the United Kingdom on a voyage between two places both situate out of the district.

Pickford, K.C., *Dawson Miller*, and *Bucknill*, for the defendants, the owners of the *Mercedes de Larrinaga*. The defendants are not answerable for the damage occasioned by the fault of the pilot, because he was, by compulsion of law, in charge of the ship within the meaning of s. 633 of the Merchant Shipping Act, 1894.

The limits and extent of the port of Liverpool are defined by s. 3 of 8 Anne, c. viii., as being "as far as a certain place in Hoyle-Lake called the Redstones, and from thence all over the

(1) [1898] P. 36.

river Mersey to Warrington and Frodsham Bridges." This includes the place of collision, and by s. 123 of the Mersey Docks Act, 1858, a penalty is imposed upon any person piloting a vessel "into or out of the port of Liverpool" without a licence. By s. 124 the pilot has to take charge of the navigation of any inward bound vessel with certain exceptions not material for present purposes. By s. 129 the master of every inward bound vessel is liable to a penalty if he does not take a pilot on board. Sect. 128 is not a complete code of the duties of the pilot in respect of inward bound vessels. It only adds an additional obligation on the pilot by requiring him to anchor the vessel, if need be, in the Mersey before taking her into some one of the wet docks within the port of Liverpool, "whether belonging to the Board or not." By the interpretation section (s. 3) the word "docks" includes "locks," and by the "Notice to Pilots," with reference to piloting a vessel into some one of the wet docks, issued by the Board, dated July 22, 1902, "Wet docks within the port include . . . . the locks to the Ship Canal at Eastham"; so that in practice the entrance to the Ship Canal is treated as a place to which it is the duty of a compulsory pilot to conduct a vessel inward bound to the port of Liverpool. It follows, therefore, that this vessel was inward bound to the port of Liverpool, that she was going to a place, namely, the lock at Eastham, in the port of Liverpool, and temporarily coming to an anchor to wait for the tide cannot bring the compulsory pilotage to an end, for the master of the vessel does not know when he engages the pilot whether he will require to anchor or not as it depends on the tide, which again determines whether the lock gates of the canal will be open or not; so that if the contention of the plaintiffs were to prevail no one could tell whether a vessel was under compulsory pilotage or not, as it would depend on an uncertain event, namely, whether she anchored or not.

In *The Rigborgs Minde* (1) Lord Esher M.R. said that it had been "argued that the compulsory pilotage had ceased, because the *Rigborgs Minde* had anchored before she was taken into dock, and that, therefore, on the authority of *The*

(1) (1883) 8 P. D. 132, at p. 135.

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Maria (1), pilotage was not compulsory; but a temporary anchorage has not this effect. It is not so, unless a vessel is finally anchored at her destination." In the present case the outside of the Eastham Lock was, for pilotage purposes, the destination, and the anchoring did not affect the matter: see also *The Annapolis*. (2)

The exemption under s. 605 of the Merchant Shipping Act, 1894, by reason of "passing through any pilotage district," does not affect this case, because it is not to apply if "discharging at any place situate above the district on the same river or its tributaries," and Manchester with its canal is on a tributary of the Mersey.

Admitting that by the Manchester Ship Canal Act, 1885, the whole of the canal is put into the port of Manchester—see s. 3—so that the lower end of the canal and locks, including Eastham Lock, is part of the port of Manchester, and not of Liverpool, that will not affect the question of pilotage, for, by s. 211, "Nothing in this Act shall take away, alter, or prejudicially affect any power, jurisdiction, or authority of the Mersey Docks and Harbour Board." The result being that, though the respective jurisdictions may overlap, the powers of the Mersey Dock Board, with reference to lighting, buoying, and pilotage, remain, and the ship pays her dues to the Dock Board under the Act of 1858.

[Reference was made to 6 Geo. 3, c. 61; 5 Geo. 4, c. 73; 6 Geo. 4, c. 75; also to ss. 118, 133, 134, 138, and 140 of the Mersey Dock Acts Consolidation Act, 1858; to Sched. II. of the Mersey Dock Act, 1899; to the Upper Mersey Navigation Act, 1876 (39 & 40 Vict. c. civ.); and to the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 603; and to the *London Gazette* of January 2, 1894, setting out the Treasury warrant of November 21, 1893, relating to the limits of the port of Manchester.]

Aspinall, K.C., in reply. The defendants have failed to avoid the effect of s. 128 of the Mersey Docks Act, 1858. The words of that section require that the vessel should be "inward bound . . . . into some one of the wet docks within the port

(1) (1867) L. R. 1 A. & E. 358. (2) (1861) Lush. 295.

of Liverpool"; and, looking at the existing legislation, it cannot be said that the Manchester Ship Canal is a wet dock within the port of Liverpool.

The Act of 1858 was passed for the purpose of controlling ships going to docks in Liverpool, whether belonging to the Board or not; but this vessel was not inward bound to the port of Liverpool. She was not engaged on any business in the port of Liverpool. Her business was with Manchester, and she was passing through the port within the meaning of the exemption in s. 605 of the Merchant Shipping Act, 1894.

The amending Act of 1899 does not help the defendants, because the words of s. 4 only refer to the employment of a pilot for the purpose of taking a vessel to and from any stage or anchorage, or mooring her in the river Mersey to the northward of an imaginary line drawn from Dungeon Point on the Lancashire shore of the Mersey to the new ferry slip on the Cheshire shore "before entering any wet dock."

[The cases of *General Steam Navigation Co.* v. *British and Colonial Steam Navigation Co.* (1) and *The Charlton* (2) were referred to.]

Cur. adv. vult.

March 16. GORELL BARNES J. The collision in this case took place between the *Bifrost* and the *Mercedes de Larrinaga* on December 21 last in the Eastham Channel of the river Mersey, near a buoy which is marked No. 4 on the chart. The place where the collision occurred is material, and the buoy in question seems to be the last in coming in towards Eastham before the Eastham Ferry is reached. Both vessels were proceeding to the Eastham Locks on the way to Manchester, and both were in charge of duly licensed Liverpool pilots.

The conclusion of fact to which I came on hearing the case, with the assistance of the Elder Brethren, was that so far as the navigation was concerned the *Mercedes de Larrinaga* was the vessel to blame for the collision, and that the fault was that of her pilot alone. As the defendants, the owners of the *Mercedes de Larrinaga*, had pleaded compulsory pilotage, the

(1) (1869) L. R. 4 Ex. 238. (2) (1895) 8 Asp. M. L. C. 29.

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point was then raised whether, the fault having been that of the pilot alone, he was compulsorily in charge of the ship so as to relieve the owners from responsibility.

The question of compulsory pilotage has since been argued before me, and on those arguments, and on such materials as have been supplied to me by counsel, I now proceed to deliver judgment.

The main point urged on behalf of the plaintiffs was that a vessel inward bound from the sea to Manchester, viâ the Ship Canal, is not subject to compulsory pilotage in the port of Liverpool. That point is one of considerable importance, because it affects the whole question of pilotage of ships, other than coasting vessels in ballast or under the burthen of one hundred tons, inward bound from the sea to Manchester, viâ the Ship Canal, and indirectly it touches the question of the pilotage of vessels outward bound from Manchester, viâ the Ship Canal, to the sea.

The place of the collision is in the port of Liverpool, for though, on looking at the plan of the Manchester Ship Canal and river Mersey, I see that there is drawn across the river from Eastham Ferry to a point above Garston a line to distinguish the limits of the powers of the Upper Navigation Commissioners that does not affect this case, because I have been informed by counsel that practically those powers deal with the buoying and so forth of part of the Mersey which is in the port of Liverpool. Then, again, there is another line drawn across the same map from a point on the Lancashire side called Dungeon Point to a point on the opposite side called Ince Ferry—one side being in the port of Liverpool and the other in the port of Manchester; but that, I understand, is only a line drawn for Customs purposes, and does not affect the question in this case.

The point that I have to consider turns principally, if not entirely, on the Mersey Dock Acts, and in particular on the Mersey Dock Acts Consolidation Act, 1858. Now, one of the early Acts relating to the port of Liverpool is the statute of 8 Anne, c. viii., and by s. 3 the port is defined in these words: "The limits and extent whereof are as far as a certain place in

Hoyle-Lake called the Redstones"—that is the outside limit apparently—"and from thence all over the river Mersey to Warrington and Frodsham Bridges." I need not concern myself with Frodsham, because, if I understand rightly, that is on the Weaver, so that the port includes the whole of the river Mersey from the sea, according to this definition, up to Warrington. It was contended by counsel for the defendants that Eastham Locks at the end of the canal might be treated as in the port of Liverpool, and as a wet dock in the port of Liverpool, but it was pointed out that by s. 3 of the Manchester Ship Canal Act, 1885. "From and after the completion and opening for traffic of the canal by this Act authorized"—the canal referred to being the now well-known Manchester Ship Canal, which is described in the preamble as "a canal from the river Mersey at Eastham to Manchester"—"the said canal and so much of the navigable waters of the rivers Mersey and Irwell as lie between Hunt's Bank in the township and parish of Manchester and the limit of the port of Liverpool at Warrington, and all channels canals cuts docks and works of the company within those limits shall be and are hereby constituted the harbour and port of Manchester." It would, therefore, appear that the lower end of the canal and locks are constituted part of the port of Manchester. Then there is a proviso that nothing in the Act is "to prejudice or derogate from the rights interests privileges and jurisdiction of the Mersey Commissioners or to prohibit alter or diminish any powers authority and jurisdiction of the said commissioners their officers and servants Provided always that such harbour and port shall not by virtue of this Act be deemed a port for customs purposes nor shall anything in this Act contained abridge or affect in any way the powers of the Commissioners of the Treasury to appoint a port of Manchester under the Customs Consolidation Act 1876 with such limits as they may think fit nor abridge or affect any powers whatsoever conferred by the said Act Provided also that nothing in this Act shall be deemed to affect any of the rights or privileges of the port or harbour of Liverpool or of the port or harbour of Runcorn or any of the rights or privileges of the station at the mouth of

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the Mersey Canal known as Ellesmere Port." I do not know what that latter proviso really preserves though it is suggested by counsel for the defendants that, notwithstanding the provision that the canal is in the port of Manchester, it still remains in the port of Liverpool for certain purposes, because of the proviso that "nothing in this Act shall be deemed to affect any of the rights or privileges of the port or harbour of Liverpool." It is not easy to say exactly what this was intended to do, but I can hardly regard that which is part of the port of Manchester as still being within the port of Liverpool. Another section of the Manchester Ship Canal Act, 1885, was referred to, namely, s. 211, by which "Nothing in this Act shall take away alter or prejudicially affect any power jurisdiction or authority of the Mersey Docks and Harbour Board"; but I do not think that that section really affects the present case.

Now, the portion of the Mersey Dock Act, 1858, which bears directly upon the present question comes under Part VI. of the Act, which is headed "With respect to pilots and pilot-boats"; and the sections which deal with inward bound vessels were considered by me in the case of *The Servia and Carinthia*. (1) Some of those sections cover the cases both of inward and outward bound vessels, and some only relate to outward bound vessels. Considering for the moment that I am dealing with an inward bound vessel, the material sections are s. 121, which gives power to the Board to license persons to act as pilots "for the port of Liverpool"; s. 123, which imposes a penalty upon any person who shall pilot any vessel "into or out of the port of Liverpool" without a licence, and s. 124, which imposes penalties upon any pilot who shall refuse to take charge of any inward bound vessel upon a proper signal being made for a pilot, and of any outward bound vessel upon the request of the master thereof. Those sections apply to both inward and outward bound ships, but s. 125 applies only to inward bound ships. That section imposes a penalty upon any pilot refusing to conduct an inward bound vessel. I think that clearly refers to a vessel bound from sea into the port of Liverpool, having

(1) [1898] P. 36.

regard to the terms of s. 123. Sect. 128 is as follows—and this gives rise to one of the arguments addressed to me—"The pilot in charge of any inward bound vessel shall cause the same (if need be) to be properly moored at anchor in the river Mersey, and shall pilot the same into some one of the wet docks within the port of Liverpool, whether belonging to the Board or not, without making any additional charge for so doing, unless his attendance shall be required on board such vessel while at anchor in the river Mersey, and before going into dock, in which case he shall be entitled to receive 5*s*. per day for such attendance." Sect. 130 provides that "in case the master of any inward-bound vessel, other than a coasting vessel in ballast or under the burthen of one hundred tons, shall refuse to take on board or to employ a pilot, such pilot having offered his services for that purpose, such master shall pay .... the full pilotage" as if the vessel had been piloted into the port of Liverpool. That, again, clearly applies to ships inward bound from the sea, and coming into the port of Liverpool. Sect. 133 gives power to the Board to fix rates for pilotage as therein stated. There are rates for piloting distances from the Great Ormshead to the port of Liverpool, at not less than 5*s*., and not more than 8*s*. per foot, according to the draught of water; and from any greater distance to the port of Liverpool at not less than 6*s*., nor more than 9*s*. per foot. Those are the sections which I think deal with inward bound ships, and it has been held that, under those sections, vessels—other than coasting vessels in ballast or under the burthen of one hundred tons—are obliged to employ pilots coming into the port of Liverpool; and the principal question for me to decide is whether the present case comes within those sections.

I think it will be desirable to refer to the sections applying to outward bound vessels, as they throw light upon the "inward bound" sections. The first section dealing more particularly with outward bound vessels, in addition to those I have already referred to—which seem to cover and deal also with the case of inward bound vessels—is s. 127, which specifies the distance to which vessels are to be piloted when they are sailing "out of the port of Liverpool," though it does not say where the pilot is to

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take charge. The next material section dealing with outward bound vessels is s. 133, which again gives power to the Board to fix rates for pilotage, and gives the rates for piloting a vessel "out of the port of Liverpool." Sect. 139 also deals with the case of outward bound ships, and provides that "in case the master of any vessel being outward bound—not being a coasting vessel in ballast or under the burthen of one hundred tons, for which provision is otherwise made—shall proceed to sea, and shall refuse to take on board or to employ a pilot," he shall pay the full pilotage rates. Those seem to be the material sections which deal with both inward and outward bound vessels, and it is to be noticed that generally the wording of the sections does not confine them to vessels which are bound to or from Liverpool. I am now referring to these sections in a general sense, but I think if they are all examined that general sense, which is one which pervades them, is that they deal with vessels which are either coming out of or going into the port of Liverpool, without saying what is to become of those vessels after they have come into the port of Liverpool, or where they are to start from in the port of Liverpool. There seems no doubt that the general effect of those sections is that every vessel—with the exceptions above mentioned—coming into the port of Liverpool, is bound to take a pilot; and so also it seems to me that every vessel outward bound—with the same exceptions—which goes out of the port of Liverpool is bound to take a pilot, although that is not a point which has to be determined in this case.

The view which I take of the broad point put forward by counsel for the plaintiffs—the main point of their whole argument—is that the pilotage is not to be confined to vessels which simply come out of some dock or anchorage in the port of Liverpool, or are bound into some dock or anchorage in the port of Liverpool; because it seems to me to make no difference with regard to these sections whether the vessel, after having come into the port of Liverpool, passes into some other jurisdiction which is not to be treated as being in the port of Liverpool. I think that that is the correct view to take of these sections, although it is obvious that in applying these sections I am

dealing with a state of things which did not exist at the time when the Act of 1858 came into force. I am quite aware that many persons object altogether to the law of compulsory pilotage as administered in England. I am not, however, called upon to express an opinion upon this broad question. The objection is that it would be better to allow ships to be navigated by their masters and officers, and that although it might be desirable to compel them to employ a pilot and have him on board for the purpose of advice, yet it is not a satisfactory state of things that he should take charge, and that they should be compelled to leave him in charge. Whichever is the correct view to take as to what is advantageous, the law is that the pilotage is compulsory; and, again, whichever view may be taken about it, whether it is to be compulsory in the sense that he is in charge, or only in the sense that he is put on board as adviser, the general consideration for having a pilot on board at all applies with equal force for the purpose of navigation, whether the ship is coming simply into a dock or anchorage in any part of the river Mersey which is in the port of Liverpool, or whether she is going through the same waters and afterwards going on to Manchester. The difficulties of navigation are precisely the same, and the advantage of having some one on board who knows the locality is precisely the same in each case; so that my conclusion with regard to the first and main point is that this vessel, the *Mercedes de Larrinaga*, was compelled to take a pilot into the port of Liverpool.

The next contention put forward by counsel for the plaintiffs was based on s. 605 of the Merchant Shipping Act, sub-s. 1 of which is as follows: "The master and owner of any ship passing through any pilotage district in the United Kingdom on a voyage between two places both situate out of that district, shall be exempted from any obligation to employ a pilot in that district or to pay pilotage rates when not employing a pilot within that district." By sub-s. 2 the exemption under this section "shall not apply to ships loading or discharging at any place situate within the district, or at any place situate above the district on the same river or its

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tributaries." It was contended that this vessel was passing through a pilotage district between two places outside that district, namely, the sea on the one hand and the port of Manchester on the other. I am not quite sure whether that section strictly applies where the employment is not with reference to a district; because in some cases I find that pilotage is made compulsory for a district, and in others, like this Mersey case, it is made compulsory on ships doing certain things, namely, moving in or out; but if the first part of the section does apply, then the question would be whether the exemption under the section does or does not apply to this ship, because she was discharging at a place situate above the district on the same river or its tributaries. Evidence has been produced shewing that the Irwell—as might be a matter of common knowledge—is a tributary of the Mersey. The Irwell pours its waters into the Manchester Ship Canal Docks at Manchester, and the waters then run down to a place where the Mersey joins the canal, and I understand that the canal really runs along the old bed of the Irwell till it joins the Mersey. Then the waters of the Mersey and the Irwell run on together until they come in the canal to a place called Rixton Junction, where they pour out into the Mersey as it still exists, and the only water which goes on down the canal from that point is the water which is used for lockage purposes. This matter was dealt with by the witness who came from the office of the engineer of the Ship Canal. The effect of his evidence is to leave the Manchester Docks as situate on a tributary of the river Mersey, and the result is that this vessel was going to discharge at a place above the port of Liverpool on a tributary of the river Mersey; and so it seems to me that the exemption under s. 605 does not apply.

The third is a minor point, but one of considerable difficulty, namely, that if a vessel bound in from sea into the port of Liverpool is bound to take a pilot into the port, yet where the ship anchors before she gets to Eastham, the compulsory service then comes to an end. This argument concedes that there was compulsion to begin with, as I have already held. In this case the *Mercedes de Larrinaga* anchored off Laird's

Yard, which is, if I remember rightly, just a little above the Woodside Ferry, and she did so for a few hours to await a suitable tide, in order to go on to Eastham. I think the plaintiffs' vessel did something of a similar character. Both vessels had to anchor for a similar object, and the collision happened afterwards when they were going up to the entrance to the Eastham Locks. The point made about this is that, under s. 128 of the Act of 1858, the compulsory services ceased as soon as the vessel came to an anchor, because it is urged that that section only requires a pilot to moor a ship at anchor in the Mersey and to pilot her into one of the wet docks of the port of Liverpool, whether belonging to the Board or not, without making any additional charge for doing so. The argument is that as she was brought to anchor in the river Mersey the compulsory pilotage finished, because she was not going on to a wet dock in the port of Liverpool, and therefore the pilot had nothing more to do. That argument was at first met by the defendants in this way: that the ship was bound to a dock in the port of Liverpool, because the Eastham Locks might be treated as being a wet dock within the port of Liverpool; but that view now seems to be disposed of by the section of the Manchester Ship Canal Act, which seems to make the end of the canal within the port of Manchester. I think if this case were to turn simply upon the construction of s. 128 it would be very difficult to say that this was a wet dock within the port of Liverpool, within the meaning of that section, although the term wet dock might not unreasonably in such circumstances be held, according to the definition in the dictionaries, to include a place which admitted ships and then excluded the tide if required. But the argument for the plaintiffs was further supported by reference to the case of *The Servia and Carinthia* (1), to which I have already referred, and it was contended that the decision in that case had the effect of shewing that compulsory services must in such a case as this come to an end, at any rate when the vessel anchored. I do not think that case determines the present case in the way the plaintiffs contend, because the question there was as

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to additional remuneration in circumstances which are stated shortly in the head-note, namely: "The Mersey Docks and Harbour Board, as the pilotage authority for the port of Liverpool, has, under s. 221 of the Mersey Docks Acts Consolidation Act, 1858, power to fix, in addition to the ordinary compulsory pilotage rates, a reasonable charge by way of 'extra' remuneration for a pilot licensed by the Board taking an outward bound vessel from a dock alongside a landing-stage to complete her loading, as in the case of embarking passengers, their baggage, and the mails. The Board has also power to fix an additional charge as extra remuneration (besides the charge per day for attendance whilst a vessel is necessarily lying in the river in the course of her navigation inward or outward) in the case of an inward bound vessel taken by a pilot to a landing-stage to land passengers, baggage, and mails, before discharging the rest of her cargo, including the case of vessels disembarking cattle and sheep at certain landing-stages in pursuance of the orders made under the provisions of the Diseases of Animals Act, 1894. *Semble*: That in the case of an outward bound vessel compulsory pilotage will not commence until the vessel proceeds from the stage to sea, and that, in the case of an inward bound vessel, the employment of the pilot by compulsion of law will cease or be suspended as soon as the vessel deviates to the stage from the route which she would otherwise follow to the dock." The real point that was raised in that case was simply a question as to extra remuneration claimed by pilots, and it arose with respect to inward bound ships, in consequence of the vessels bringing cattle to Liverpool going first of all into the river, then to a stage to land cattle, and then into one of the docks, and, with regard to outward bound vessels coming out of dock first and then proceeding to one of the stages—the Prince's Landing-stage—for the purpose of taking up passengers, cargo, and mails, and then proceeding to sea. It was contended that these were onerous and difficult duties for the pilots and that they were entitled to extra remuneration, and that in such circumstances they were doing something which was not contemplated as part of the pilot's duties without extra remu-

neration. It does not appear to me when that case is carefully examined, that it affects in any material degree the question which I have to decide now; but in construing s. 128 for the purposes of the present case it will be necessary to consider it in connection with the other sections, and in view of the possible state of things which may arise. First, take the case of a vessel coming in from the sea and going straight up to the Eastham Locks. She is an inward bound vessel, bound in from the sea to the port of Liverpool. She does not come to an anchor at all, and it seems to me that she is bound to take a pilot coming in. Then the question is where does his duty as a compulsory pilot cease? In substance the answer of counsel for the plaintiffs was that compulsory pilotage ought to cease when the vessel had passed the position in which she would be going into any wet dock in the port of Liverpool; but that does not seem to me a satisfactory answer, and leaves a serious difficulty open as to the termination of the services. It certainly does not cover the case of a vessel which is bound up to Garston. The answer in that case probably is that such a vessel is within s. 128, because she is going to a wet dock which, although not belonging to the Board, is within the words, "Whether belonging to the Board or not"; but it seems to me that with regard to a vessel going straight up to Eastham the only reasonable conclusion is that the pilot taking charge at sea must take her on to Eastham, where her navigation in the port of Liverpool is to cease, for I am unable to see how it can consistently be argued or dealt with in practice under the sections in any other way. The ship is being taken to a spot in the river Mersey which is at the end of her necessary navigation in the port of Liverpool; and it does not seem to me to put any undue strain upon the sections which have been under consideration. This view gets rid of the doubt raised in the course of the case whether the compulsion is to exist in case a vessel goes to Eastham direct, or is to exist up to the time that she anchors. Counsel for the plaintiffs contended that—assuming there was compulsion to begin with—if the vessel is going up to an anchorage the compulsion would last till she anchored, but if she was going

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to Eastham direct there would not be any compulsion at all. But how are those responsible to elect that when the pilot comes on board outside the bar? It is impossible to be certain in all cases whether a vessel would have to anchor or go straight on. A thick fog, for instance, might prevent her going on. Then, again, with regard to the argument about anchorage, it is said that if the vessel comes to an anchor she has finished her navigation so far as the river is concerned, and that, therefore, the pilotage ceases to be compulsory. That may be true if the anchorage is the final point of destination, so far as navigation at that time is concerned; but I do not see how it can be treated as coming to an end if the anchorage is only anchorage in the itinerary towards the destination which it is necessary to get to in the ordinary course of navigation. If that were to be so held, then the moment a vessel dropped her anchor in the Mersey, even though she did so compulsorily, and was going to a second anchorage as her final destination, according to the plaintiffs' argument, that first anchorage would put an end to the compulsory services. This vessel came to an anchor for navigation reasons until the tide permitted her to proceed, and it seems to me that such temporary anchoring is only in the itinerary towards the destination in the river to which she is entitled to have a pilot to take her.

I have already referred to the point made with regard to the question of the wet dock, and that difficulty I do not think I need say anything more about, because the Ship Canal Act appears to have altered the position. It may be possible to hold that for pilotage purposes the end of the canal is still to be treated as within the port of Liverpool, and for such purposes—as stated in the "Notice to Pilots" issued by the Mersey Dock Board—is a wet dock; but I do not feel that it is necessary to base my decision upon it, and I feel great difficulty because of the Ship Canal Act of 1885.

With regard to outward bound vessels it may be noticed that no point of departure is mentioned in any of the sections which deal with the employment of pilots on outward bound ships. It seems to me, having regard to their generality, that

any vessel—with the exceptions already mentioned—proceeding to sea out of the port of Liverpool would have to take a pilot, and there is no such difficulty, as suggested with regard to inward bound vessels—in consequence of the terms of s. 128—in applying compulsory pilotage to vessels proceeding to sea from Eastham. They would have to take a pilot on leaving Eastham, and it would be strange if one had to construe the Act in such a way that inward bound vessels—with the exceptions mentioned—would not have to employ a pilot right up to Eastham.

There are other points which possibly require, and possibly may have at some future time, some further consideration, but at present it does not seem to me that any of the other points which have been touched upon affect the view which I have taken upon the general sections. There is, for instance, s. 140 of the Act of 1858, which deals with who is liable to pay pilotage. If that section had in any way restricted the recovery of pilotage as against persons who were in the port of Liverpool or against ships in the port of Liverpool, it might be urged that pilotage ought only to be applied to such ships as the rates could be recovered against and such persons as were connected with those ships in the port of Liverpool; but the section is quite general, and although there may be difficulties about enforcing it against persons or ships not in the port of Liverpool, I cannot see that it affords sufficient answer to the argument that pilotage is compulsory in the way I have held.

There is one other matter to consider, and that is the effect of the statute of 1899. That Act was passed in order to meet the difficulty which was pointed out in the case of *The Servia and Carinthia*. (1) It recites that, "Whereas by the Mersey Dock Acts Consolidation Act, 1858, the masters of vessels inward bound for and outward bound from the port of Liverpool are (subject to the exemptions by the said Act granted) required to employ pilots." Then it deals with the difficulties raised in the case, and proceeds to legislate so as to get rid of those difficulties and free the matter from the doubt which

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that case raised. Counsel for the plaintiffs relied upon this recital as shewing that the Act of 1858 was only dealing with vessels inward bound for and outward bound from the port of Liverpool; but if that recital is compared with the terms of the Act of 1858 it will be found, I think, that the recital is not strictly correct, because in the Act of 1858 the words are, not "inward bound for and outward bound from" the port of Liverpool, but the Act deals with vessels "bound into and out of" the port of Liverpool. That does not seem to admit so readily—as if that recital were correct—the view that the Legislature was only dealing with vessels which had Liverpool for their terminus a quo and ad quem. I do not think that that Act has any real bearing upon the present case. It may be that under s. 5 vessels are dealt with passing from Manchester to Liverpool, or from Liverpool to Manchester, but I am not concerned to consider that point. Counsel for the plaintiffs suggested that there was great difficulty in working out this matter if it was held that pilotage was compulsory. I, however, see no difficulty in the application of the Act. It is a simple matter. Every vessel, if I am right, bound in from the sea—with the exceptions mentioned—to the port of Manchester and going into the canal at Eastham is to take a pilot; and so, though I have not to decide that, has, apparently, every vessel—with the exceptions mentioned—going out from Eastham to the sea. The result is that, as I have found that the fault in this case was the fault solely of the pilot of the *Mercedes de Larrinaga*, the defendants' plea of compulsory pilotage is established. Both the plaintiffs' claim and the defendants' counter-claim will, therefore, be dismissed.

On the question of costs:—

Dawson Miller, for the defendants, the owners of the *Mercedes de Larrinaga*. In *The Princeton* (1) the defendants alleged that the two collisions were caused by the negligence of those in charge of the plaintiffs' vessel, and further that if there were any negligence on the part of those in charge of

(1) (1878) 3 P. D. 90.

their vessel, it was that of the compulsory pilot. By way of counter-claim the defendants claimed the amount of damage sustained by the alleged negligence of those in charge of the plaintiffs' vessel. The Court found that the collisions were solely attributable to the negligence of the pilot in charge of the defendants' vessel by compulsion of law, and gave no costs on either side.

Aspinall, K.C., for the plaintiffs, the owners of the *Bifrost*. In *The Ruby* (1) the plaintiffs' claim for damage by collision was dismissed without costs, the Court having found that the defendants' vessel was alone to blame for the collision, but that the defendants were exempt from liability as the fault was solely that of the pilot compulsorily in charge. The defendants' counter-claim was dismissed with costs on the authority of precedents establishing the practice of the Court.

In the present case each party charged the other with negligence, and both sides set up compulsory pilotage as an alternative defence. The result, it is submitted, is, that as the defendants, in addition to defending the case on its merits, set up a counter-claim, that counter-claim should be dismissed with costs: see Marsden's Collisions at Sea, 4th ed. p. 356.

GORELL BARNES J. The plaintiffs' claim will be dismissed without costs. The defendants' counter-claim with costs.

Solicitors for plaintiffs, the owners of the *Bifrost*: *Hill, Dickinson, Dickinson, Hill & Roberts, Liverpool.*

Solicitors for defendants, the owners of the *Mercedes de Larrinaga*: *H. Forshaw & Hawkins, Liverpool.*

(1) (1890) 15 P. D. 139.

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THE SUSSEX.

Admiralty—Collision—Compulsory Pilotage—Port of Liverpool—Limit of Compulsion outwards—Mersey Dock Acts Consolidation Act, 1858 (21 & 22 *Vict. c. xcii.*), *ss.* 127, 133—*Failure to stand by*—"*Person in Charge*"—"*Proof to the contrary*"—*Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *s.* 422.

The pilot of the defendants' vessel outward bound from Liverpool was found alone to blame for a collision with the plaintiffs' vessel at anchor one mile S. ½ E. of the Mersey Bar Lightship, and the "person in charge" of the defendants' vessel was also found to have committed a breach of s. 422 of the Merchant Shipping Act, 1894, by failing to stand by the plaintiffs' vessel:—

Held, by Gorell Barnes J., that the defendants were not liable for the damage sustained by the plaintiffs, first, because the pilot was compulsorily in charge, the place where the collision occurred being inside the Bar Lightship, which, though further out to the westward, represents the Fairway Buoy of the Queen's Channel, now removed, but, at the time of the passing of the Mersey Dock Acts Consolidation Act, 1858, marking the spot, inside the place of collision, where a vessel passing out through the channel would be clear of danger, and, therefore, at that time, made the westernmost limit, for pilotage purposes, of the port of Liverpool; secondly, because, on the authority of *The Queen*, (1869) L. R. 2 A. & E. 354, the pilot being alone to blame for the collision and being compulsorily in charge, "proof to the contrary" had been given rebutting the presumption that the collision had been caused by the wrongful neglect of the master.

ACTION of damage by collision.

The plaintiffs were the owners of the *Gladestry*. The defendants were the owners of the *Sussex*.

The case is reported on the question of the limits seaward of the port of Liverpool for pilotage purposes (1), and as to the

(1) As to the limits of the port of Liverpool, (1709) 8 Anne, c. viii., s. 3: ". . . . the limits and extent whereof are as far as a certain place in Hoyle-Lake called the Redstones, and from thence all over the river Mersey to Warrington and Frodsham Bridges . . . . "

Mersey Dock Acts Consolidation Act, 1858 (21 & 22 Vict. c. xcii.), s. 127: "Every pilot taking upon himself the charge of any vessel shall, if so required by the master thereof, pilot such vessel, if sailing out of the port of Liverpool, through the Queen's Channel, so far to the westward as the buoy commonly called or known by the name of the Formby North-West Buoy, or Fairway Buoy, of the Queen's Channel; and if sailing through the Rock Channel, pilot the same so far to the westward as the

meaning to be attached to the words "proof to the contrary" in s. 422, sub-s. 2, of the Merchant Shipping Act, 1894. (1)

The material facts were shortly as follows:—

On December 20, 1903, about 1 A.M.—the weather being fine and clear, the wind south-easterly light, and the tide one hour's ebb—the steamship *Sussex* of 5474 tons gross register belonging to the defendants, whilst on a voyage from Liverpool to London, came into collision with the plaintiffs' steamship *Gladestry*—of 2360 tons gross register, on a voyage from Savannah to Manchester with a cargo of cotton and phosphate rock—which was lying at anchor about one mile S. ½ E. magnetic of the Mersey Bar Lightship.

By their statement of claim the plaintiffs—after charging

North-West Buoy of Hoyle; and any pilot who shall in any such case refuse to pilot such vessel to such distance as aforesaid shall forfeit his right to receive any sum of money for piloting such vessel, and may also, at the discretion of the Board, be deprived of his licence."

V. "*As to Pilotage Rates.*"

Sect. 133: "The Board may from time to time determine, vary, and alter and fix rates of pilotage to be paid to pilots for piloting vessels, such rates to be according to the draught of water of such vessels, and to be within the limits following, that is to say:—

"(a) *As to British Vessels.*

* * * * *

"For piloting a vessel out of the port of Liverpool, not less than three shillings and not more than four shillings per foot."

(1) 57 & 58 Vict. c. 60, s. 422: "(1.) In every case of collision between two vessels, it shall be the duty of the master or person in charge of each vessel, if and so far as he can do so without danger to his own vessel, crew, and passengers (if any),

"(*a*) to render to the other vessel, her master, crew, and passengers (if any), such assistance as may be practicable, and may be necessary to save them from any danger caused by the collision, and to stay by the other vessel until he has ascertained that she has no need of further assistance, and also

"(*b*) to give to the master or person in charge of the other vessel the name of his own vessel and of the port to which she belongs, and also the names of the ports from which she comes and to which she is bound.

"(2.) If the master or person in charge of a vessel fails to comply with this section, and no reasonable cause for such failure is shewn, the collision shall, in the absence of proof to the contrary, be deemed to have been caused by his wrongful act, neglect, or default.

"(3.) If the master or person in charge fails without reasonable cause to comply with this section, he shall be guilty of a misdemeanor, and, if he is a certificated officer, an inquiry into his conduct may be held, and his certificate cancelled or suspended."

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those on board the *Sussex* with failing to keep a good look-out, to keep out of the way, to slacken speed, and to comply with arts. 23 and 29 of the Regulations for Preventing Collisions at Sea—alleged that "The master or person in charge of the *Sussex* without reasonable cause failed to stay by the *Gladestry* until he had ascertained that she had no need of further assistance and failed to comply with s. 422 of the Merchant Shipping Act 1894 and to give the particulars required thereby."

The defence was as follows:—

"1. The defendants admit that the plaintiffs have suffered damage by a collision between their steamship *Gladestry* and the steamship *Sussex* belonging to the defendants and that such collision was solely caused by the negligent navigation of the *Sussex*. They deny that such negligent navigation was by themselves or their servants or by any person for whose acts they are responsible at law.

"2. The damage to the plaintiffs' vessel was occasioned by the fault or incapacity of George Frederick Parkinson being a qualified pilot in charge of the *Sussex* by compulsion of law at the time of the collision. The said collision occurred within the Liverpool pilotage district in which or in part of which the employment of a pilot was by law compulsory on the defendants. The said George Frederick Parkinson though the lights of the *Gladestry* were reported to him when the *Sussex* was more than a mile distant from the *Gladestry* so navigated the *Sussex* that she ran into the *Gladestry* which was lying at anchor.

"3. Save as above admitted, the defendants deny each and every allegation in the statement of claim."

At the hearing on March 17, 1904, before Gorell Barnes J., assisted by two of the Elder Brethren of the Trinity House, the pilot in charge of the *Sussex* was called and his licence produced. (1) The learned judge intimated early in the course of the evidence that, in the opinion of the Court, the pilot of the

(1) "Pilot of the First Class.
"Pilot boat No. 3.
"*The Mersey Docks and Harbour Board Pilotage Department.*
"Licence No. 104.
"To all whom it may concern, be it known that George F. Parkinson, aged 65 years, being 5 ft. 8 in. in stature, having a fair complexion, and whose place of abode is 20, Sandown Road, Seaforth, having, in pursuance of the provisions of 'The Mersey

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Sussex was alone to blame for the collision, and, therefore, the arguments were restricted to the question of the pilotage being compulsory, and, if so, its effect on the failure to stand by. The evidence on the latter point is sufficiently set out in the judgment.

Pickford, K.C., and *Balloch*, for the plaintiffs, the owners of the *Gladestry*. The defendants are charged with a breach of s. 422 of the Merchant Shipping Act, 1894, by which a collision between two vessels will be deemed to have been caused by the wrongful act, neglect, or default of the master or person in charge of that one of the vessels failing to stand by and render such assistance to the other as may be practicable, and the presumption will only be rebutted by proof of reasonable cause for failure to comply with the provisions of the section.

It is submitted that the evidence is overwhelming as to the neglect of duty in this respect, and the question is who was the "person in charge" who has incurred the statutory liability, and whether he was a servant of the owners of the *Sussex*.

The case of *The Queen* (1) was decided by Sir Robert Phillimore under s. 33 of the Act of 1862 (25 & 26 Vict. c. 63) in which the words "person in charge" alone appear, and these were held to mean the master. The word "master" has been added in the Act of 1894, and, on the evidence, it seems clear that the owners of the *Sussex* are liable, as no reasonable cause

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Dock Acts Consolidation Act, 1858,' been duly examined, and found to be qualified to conduct any vessel into or out of Liverpool, Holyhead, Beaumaris, Chester, Fleetwood, Pile of Foudre, and the Isle of Man, is, by this certificate, duly licensed to act as a *pilot of the first class* for the port of Liverpool, from the date hereof until the first day of June, 1904, provided that he shall so long comply with the provisions of the said Act, and of all other Acts binding upon him in relation to pilotage and with every order or by-law made by the said Board, and shall conduct himself with propriety and prudence.

"Given by the said Board, and certified under the hand of their secretary, this first day of June, in the year of our Lord one thousand nine hundred and three.

"Miles Kirk Burton,
"Secretary."

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has been shewn for the failure by the master to comply with the provisions of the section.

It is true that in that case Sir Robert Phillimore seems to have been of opinion that, if the collision had been caused solely by the neglect of the pilot, the subsequent misconduct of the master in not rendering assistance would not have made the owners of the vessel liable for the collision; but that assumes that the pilot was compulsorily in charge. Here it is submitted that the pilot was not in charge by compulsion of law, for, admitting that he was properly in charge at the outset, his duties had, under s. 127 of the Mersey Dock Acts Consolidation Act, 1858, ceased before the *Sussex* reached the spot where the collision took place. The vessel in proceeding outwards had gone through the Queen's Channel, and the compulsory pilotage came to an end at the Fairway Buoy, which is the limit to which the master can require the pilot to conduct his vessel under the section in question. This buoy may be taken to represent, in that part of the channel, the seaward boundary of the port of Liverpool under s. 3 of 8 Anne, c. viii., as modified, for pilotage purposes, by the Act of 1858. It is true that the Dock Board have removed the Fairway Buoy, and so the matter is a little complicated; but the spot where the buoy was can easily be identified by reference to the chart, and, when once the vessel had crossed the line drawn through the place where the Fairway Buoy was formerly situated, the compulsory pilotage came to an end, and it is not material what the actual space of water was from this point, though, as a matter of fact, the line would be some considerable distance inside the place of collision.

Aspinall, K.C., and *Lewis Noad*, for the defendants, the owners of the *Sussex*. The pilot of the *Sussex* was, at the time and place, in fact in charge, though it is contended, on behalf of the plaintiffs, that he was no longer in charge by compulsion of law, and, therefore, that the master was legally in charge, so that the relation of master and servant had arisen, rendering the owners of the *Sussex* liable for the collision. It is, however, submitted that it is not material whether the Fairway Buoy was originally the limit of the port of Liverpool

or not, for, by s. 603 of the Merchant Shipping Act, 1894, the master of an unexempted ship cannot pilot his own ship after a qualified pilot has offered to take charge if within a district where pilotage is compulsory, and, in *General Steam Navigation Co.* v. *British and Colonial Steam Navigation Co.* (1), it was held that the pilot need not be compulsorily employed at the spot where the accident happens, but only that he should have been compulsorily employed within the district where it happens—that is to say, a pilot may be still in charge in the district for which he is licensed, though outside the limits of the port in which he is a compulsory pilot.

There the pilot came on board at Dungeness, where the master coming up the Channel was compelled to take him, and the employment of the pilot, and the pilotage rates, were from Dungeness to Gravesend, above the point where the collision took place, and the pilot had the right to insist on being carried to Gravesend, as well as the right to pilot the ship during its whole course thither, although the ship belonged to the port of London, and, therefore, might be exempt from compulsory pilotage at the place of the collision. That case was followed in *The Charlton* (2), where it was held that, assuming the collision to have been at a spot not within the port of Bristol, it was within the Bristol Channel pilotage district within a part of which (namely, the port of Bristol) the employment of a pilot was compulsory, and as the pilot was still in charge as pilot within the district for which he was licensed, though he had passed the limits of the port in which he was a compulsory pilot, the relationship of master and servant did not exist between him and the owners of the ship he was piloting at the time of the collision, and, therefore, the owners were not liable for his negligence.

In the present case the owners of the *Sussex* were compelled to employ a pilot to take the vessel out of the port of Liverpool, and the Dock Board is, by s. 133 of the Mersey Dock Acts Consolidation Act, 1858, authorized to determine and fix the pilotage rates. These rates are from Liverpool to the Bar Lightship, off which the pilot-boats cruise, for the bar itself

(1) (1869) L. R. 4 Ex. 238. (2) (1895) 8 Asp. M. L. C. 29.

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is gone, having been dredged away. The contract, therefore, was to take and pay for the pilot as far as the Bar Lightship, which is well outside the place of collision, and, as no Fairway Buoy now exists, there is no sign of any place where the pilot can be discharged until the Bar Lightship is reached. The pilot, and not the master, was, therefore, in charge, and the pilot was not the servant of the owners of the *Sussex* at the time and place of the collision, and they are not liable.

As to the second point, namely, the failure to stand by, if the compulsory pilotage had ceased, no doubt the master would be responsible, and, therefore, the owners of the *Sussex* liable; but if, as is submitted is the case, the pilot was still in charge by compulsion of law, then "proof to the contrary" has been given, within the meaning of s. 422 of the Merchant Shipping Act, 1894, and the collision cannot be deemed to have been caused by the wrongful act, neglect, or default of the master.

Pickford, K.C., in reply. The case of *The Charlton* (1) is only an illustration of the decision in *General Steam Navigation Co.* v. *British and Colonial Steam Navigation Co.* (2), which turns on the fact that the pilot was licensed for the district in which the collision took place. In the present case there is no district for which the pilot could be licensed. He was only licensed for the port of Liverpool, which does not extend seawards as far as the place of collision, and the power given to the Dock Board to fix the pilotage rates does not authorize the extension of the limits of the port.

In order to render the owners of the *Sussex* not answerable for the damage occasioned by the collision they must shew, in the words of s. 633 of the Merchant Shipping Act, 1894, that that damage was "occasioned by the fault or incapacity of a qualified pilot acting in charge of the ship within a district where the employment of a qualified pilot is compulsory by law," and that, it is submitted, they have failed to do, for by s. 586, sub-s. 4, of the same Act, "every qualified pilot acting beyond the limits for which he is qualified by his licence shall be considered an unqualified pilot," and the pilot was only

(1) 8 Asp. M. L. C. 29. (2) L. R. 4 Ex. 238.

licensed "for the port of Liverpool." It follows from this that, at the time and place of the collision, he was not forced upon the owners of the *Sussex* by compulsion of law, and that the master was again in charge; so that they are liable under s. 422 of the same Act for the damage sustained by the *Gladestry*.

March 18. GORELL BARNES J. The question in this case is whether the owners of the defendant vessel are responsible for the damage which was occasioned to the plaintiffs' vessel. The defendants' ship, according to the master's evidence, had no damage at all. The charges that are made by the plaintiffs in the statement of claim impute negligent navigation to those on the *Sussex*, and they also impute a breach of s. 422 of the Merchant Shipping Act. The defendants admit that the collision was solely caused by the negligent navigation of the *Sussex*. They deny that such negligent navigation was by themselves or their servants, or by any person for whose acts they are responsible at law. Then they plead in the second paragraph of the defence the usual plea of compulsory pilotage, and allege that the damage was occasioned by the fault or incapacity of the pilot in charge of the *Sussex*.

Now the plaintiffs' vessel being at anchor, with proper lights shewing, and the defendants' vessel having navigated into her in weather that was quite fine enough for the moving vessel to keep clear of the one at anchor without any difficulty, it is obvious that the defendants' vessel is to blame for this collision, and that the defendants would be liable, unless they are exempted by reason of the vessel being in charge of a compulsory pilot. I think it will appear when I come to deal with the case of *The Queen* (1), before Sir Robert Phillimore, that that question of compulsion, or non-compulsion, determines both questions in the case, namely, navigation and the point raised under s. 422 of the Merchant Shipping Act.

The first point to determine is one about which I have already given my view, namely, whether the pilot was alone to blame. There is not, to my mind, the least doubt about that.

(1) L. R. 2 A. & E. 354.

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In fact, after a slight intimation of the view I was about to take, the matter really was not further discussed.

The master of the defendants' vessel said that the light was reported—that is, the light on the plaintiffs' vessel—and that at the time the light was reported something took place between him and the pilot. Questioned as to what it was, he replied: "The pilot said it was a vessel under way, and I said it was a vessel at anchor shewing two riding lights." The man forward had reported the light at a proper time, and the attention of the pilot was called to it by the master, and the master was right about it and the pilot was wrong. We have had the pilot in the witness-box, and he has given his account of the matter, and he says he could see the lights. I think he said that he took them to be two stern lights of outward bound vessels. I think he also said he thought it was a green light, and that the master told him he thought it was a vessel at anchor. My impression is that, whatever the pilot has in fact said, the master has given a correct account of the matter, and that the pilot was alone to blame for this collision. He was in charge in fact, all his orders were obeyed, and, with the vessel shewing both her anchor lights quite plainly, and his attention having been called to them, he made a mistake about them. Now the master was asked this question about the pilot: "Did you notice anything peculiar about him at all?" and his answer was that "he was very deaf—a very aged man." Having seen the pilot, I am not prepared to dissent from the description given of him by the master. It is true that the master did make him hear that he (the master) wished to convey to him that it was a vessel shewing two riding lights; but from what he said himself, I think it is possible that in addition to his defective hearing his sight is not what it was when he was a younger man; and I have no doubt that it requires a man with all his faculties wide awake and well on the alert to have charge of a vessel in taking her in and out of the crowded waters of the Mersey. I have not had any information given me as to what steps are taken to ascertain from time to time whether the pilots are still preserving their faculties to the extent which is desirable when persons are compelled to employ them.

There are, I presume, provisions of some kind made under s. 585 of the Merchant Shipping Act. I understand that a pilotage certificate for the Mersey is renewed from year to year; so that there are, I suppose, some steps taken to see that the capacity of the pilots is maintained. I make this general observation because it is essential that, where pilots are compulsorily employed, they shall have that alertness which is necessary in order to deal with the difficulties of navigation which they have to encounter.

The second point is whether there was a breach of s. 422 of the Merchant Shipping Act. [The learned judge read the two first sub-sections already set out, and continued:—]

The first question is, Was there in fact a breach of the section? The evidence of the master of the plaintiffs' ship is as follows: "Was there any hailing?—Only from our vessel. What was it?—I heard the second mate hail him to ask him his name, and then I ran forward and I asked him his name. Did any of you get an answer?—The only reply we got was, 'Are you badly damaged?'—or words to that effect. Anything else?—Nothing else. I repeated several times, 'What ship is that?' and 'What is your name?'—and that was all I got from him. You got no answer?—No. Were you able to tell what her name was?—No, she was so high above us. Then you said they asked, 'Are you badly damaged?'—Yes. Did you answer that question?—I sang out, 'Yes,' thinking that would make him stand by us. When you sang out that, how far was she from you?—She would be about twenty feet off then—no distance at all. Do you think they would hear you?—Most decidedly. What did you do after that?—I went to see what damage was done to my ship—to see what water she was making. Were any soundings taken on your ship?—Yes; I went and saw the sounding taken immediately after hailing the other ship. And after these soundings had been taken did you see anything of the *Sussex*?—As soon as I took the soundings I went to see the damage forward, and then when I turned round I saw what I took to be her stern light vanishing in the distance. How long do you think altogether the *Sussex* remained close to you?—She got away as soon as she could—

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that was my opinion of her; she could not have been so very long, because I just looked at the damage and then turned round and she was gone. Did you ever see anything of her after that?—No. Before you got to Manchester did you ascertain her name?—No, I never heard anything about her." Further on he is asked: "You did hear hailing from the *Sussex* to inquire whether you were badly damaged, did you?—I did. And then when she did sheer from you she went stern foremost, shewing her side lights and masthead lights? Did she sheer as if she was going astern as she left you?—As she backed off from us—yes. Did they ask your name on board the *Sussex*?—They did not." The second mate of the plaintiffs' vessel gave similar evidence, and the evidence for the defendants does not, practically, amount to any contradiction of the evidence given by the plaintiffs.

Now, I do not think, after considering the evidence, that the master of the defendants' ship intentionally wished to run away or keep his name dark. It would not have been the slightest use trying to do so, because there was a pilot on board, who had been taken on board in the usual way, and they must have known all about it afterwards. I think that the explanation is that which he gives himself. He said he was excited and worried. But the question is whether a master in charge of a large vessel like this is entitled to be excited and worried, and not stand by simply for that reason. In my judgment, there was in fact a failure to stand by and give the name, under s. 422; and the question that then comes to be considered is whether a reasonable cause for such failure has been shewn. Both I and the Elder Brethren, who are much better judges about this than I am, think that no reasonable cause has been shewn for this failure. If cause were allowed to be shewn on such facts as these, every shipmaster would be able to shew cause. In my judgment there has been no reasonable cause shewn for failure to comply with some part of s. 422, at all events. That brings me to the law applicable to the case. The position is this: There was, from what I have shewn, in my opinion negligence on the part of the pilot alone which caused the collision. There was failure to comply

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with s. 422; and there has not been sufficient cause shewn for that failure. But as the pilot was in charge in fact, then, if he were compulsorily in charge, the negligence of the pilot alone would not render the owners responsible for the navigation of the vessel, and the failure to comply with s. 422 would, in my judgment, according to the decision in the case of *The Queen* (1), not make the collision one deemed to have been caused by the master or any other servant of the shipowners. Sub-s. 2, it will be remembered, says that "if the master or person in charge of a vessel fails to comply with this section, and no reasonable cause for such failure is shewn, the collision shall, in the absence of proof to the contrary, be deemed to have been caused by his wrongful act, neglect, or default." Now, Sir Robert Phillimore, in dealing with the corresponding section of the older Act (25 & 26 Vict. c. 63, s. 33), in which the words are "person in charge," said: "It has been argued on behalf of the *Lord John Russell*"—one of the ships in that case—"that the *Queen* is not entitled to claim this exemption, upon two grounds; first, upon the construction of s. 33 of 25 & 26 Vict. c. 63. And this upon two grounds; first, it is said that the 'person in charge' intended by that section must, having reference to the context, be deemed to be the master, and with this part of the argument I agree; secondly, it is contended that whereas the master has been guilty, as in this instance, of a violation of his duty in offering no assistance to the other vessel which came into collision, he is, by the words of the statute, to be deemed alone to blame for the collision, and that it follows by necessary implication that the pilot exemption, so to speak, is taken away. With this portion of the argument I am quite unable to concur. There is no doubt, on the assumption, of course, that the pilot is alone to blame for the collision, that his liability and the exemption of the master attached when that fact took place; and if it was intended by the statute to say that the subsequent misconduct of the master would remove the exemption and fix the liability of the collision upon the master, the language, in order to produce this result, ought to have been much clearer and

(1) L. R. 2 A. & E. 354.

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plainer than I now read it to be." Even assuming that the failure was to be treated as that of the master, I am not concerned for the moment in considering whether it is or is not, because the effect of the decision that the pilot is solely responsible is that proof to the contrary has been shewn, and it clears the master and other servants of the shipowners. The wording of the sub-section is: "The collision shall, in the absence of proof to the contrary, be deemed to have been caused by his wrongful act neglect or default." The master and other servants of the shipowner are not responsible, and the collision cannot be deemed to have been caused by their wrongful act or default.

Now that, I think, counsel on both sides have agreed, leaves the question to be determined, which governs both points, Was the pilot in this case compulsory or not? The pilot was, in fact, navigating, and the question is reduced to this: Was he compulsorily in charge? Or, perhaps, having regard to the defendants' argument, I might say: Was he in charge in such circumstances that the owners are not liable for his acts? That covers the points taken by counsel for the defendants in connection with the various cases cited. This question turns upon a certain curious state of facts, and also upon the Mersey Dock Acts Consolidation Act, 1858, some of the sections of which were recently considered in this Court. (1) Now, that Act makes pilotage compulsory for outward bound ships. I need not go into the question here of inward bound ships. The sections which apply to this subject are ss. 121, 123, 124, in particular s. 127, and ss. 133 and 139. The general effect of those sections—I am only summarising them—is that, so far as outward bound ships, with certain exceptions not material to this case, are concerned, the pilotage is compulsory, and a pilot must be employed to pilot the vessel out of the port of Liverpool. The port of Liverpool is defined by the old statute of 8 Anne, c. viii., s. 3, in these words: "The limits and extent whereof are as far as a certain place in Hoyle-lake called the Redstones, and from thence all over the river Mersey to Warrington and Frod-

(1) See *The Mercedes de Larrinaga*, p. 215, above.

sham Bridges." The vessel is under pilotage out of that port. Now the collision in this case, I think there can be no doubt, took place outside the port of Liverpool. The spot which I have already stated as being the place of the collision is to the westward, considerably, of the place called the Redstones. The particular section under which the present difficulty arises is s. 127, which provides that "every pilot taking upon himself the charge of any vessel shall, if so required by the master thereof, pilot such vessel, if sailing out of the port of Liverpool, through the Queen's Channel, so far to the westward as the buoy commonly called or known by the name of the Formby North-West Buoy, or Fairway Buoy, of the Queen's Channel . . . . and any pilot who shall in any such case refuse to pilot such vessel to such distance as aforesaid shall forfeit his right to receive any sum of money for piloting such vessel, and may also, at the discretion of the Board, be deprived of his licence." At the time that the Act of 1858 was passed there was in fact a buoy called the Fairway Buoy, and it seems to have been placed on the charts by the name of the Bell Beacon, at the outside end of the Queen's Channel, which is that part of the Crosby Channel to the westward, the Formby Channel going more to the N. or N.W. That Bell Beacon is shewn on the oldest chart that has been furnished to me, corrected up to May, 1870, and it is shewn as a little outside the five-fathom line. It is shewn well clear of the bar, as it then existed, and it has been agreed in the course of the argument that that is about, or I may take it that is about, the position of the Bell Beacon or Fairway Buoy in 1858. I do not suppose it is precisely the same, because changes of a slight character may have been made from time to time; but at any rate it is sufficiently near for the purposes of the present case. Now, that position has been transferred by the Elder Brethren for me on to the latest chart I have been furnished with, namely, one published on December 21, 1903; and it will be found that that position puts the old site of the Fairway Buoy a little to the eastward of what is marked on the present chart as QB 2 gas light fixed and black buoy on the northern side of the channel, and a little to the S. and W. of Q 3, and almost on

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top of a very shallow sounding on the bank. The state of things at the present time is that that buoy has been removed, and has been removed for some considerable time as I understand, and in recent years the bar has extended itself further and further out to sea, as far as one can judge from these charts; and in still more recent years the channel has been dredged somewhat to the westward of the old site of the Fairway Buoy, and is now marked on the chart as "Dredged cut"; and there are four gas buoys marking that dredged cut, and they are marked as Q 2 and Q 1 on the northern side and B 1 and B 2 on the southern side. Those buoys are all inside the five-fathom line. Now, the place of the collision, which has also been marked for me on the chart, is shewn on the chart which I am referring to as about half to three-quarters of an inch below the centre of the word Bidston, just between the two figures 5 and 5¼. There is now, and has been for a long time—I think it has been said since 1884—the Bar Lightship, which is shewn on the 1903 chart to the westward a little of the five-fathom line and the northern exit of the Queen's Channel. So that if you run on past these gas buoys Q 2 and Q 1 and completely cross the bar, and then pass over the five-fathom line, in a very short distance you come upon the Bar Lightship. So that the place of the collision is outside the old position of the Fairway Buoy and inside the position of the Bar Lightship. The point is now made that under s. 127 of the Act the pilot's duties ceased, and compulsory pilotage ceased, as soon as the vessel passed the position in which the old Fairway Buoy was when the Act of 1858 was passed. There is one point, before dealing with that main point in the case, which I will dispose of shortly. Counsel for the defendants contended that s. 133 gave the Dock Board power to extend the limits to which ships had to be taken. That section states that the Board may from time to time determine, vary, and alter and fix rates of pilotage to be paid to pilots, and their contention was that as the Board had done something, namely, treated the Bar Lightship as the place to which the pilots had to go, they had extended the distance to which ships have to be taken, by virtue of s. 133. I do not, however, myself regard that section as having any

such effect. Pilotage is compulsory on vessels outward bound, except in the cases above referred to, and I regard this section as one which only deals with the rates which, within certain limits, the Board may fix. I do not think that section supports the contention in question.

Now, so far as the Dock Board is concerned, what has been done with regard to this matter appears to be that they have taken away the old Bell Beacon, they have placed the Bar Lightship in the position which I have described, they have placed the gas buoys to which I have referred, they have deepened the channel, and they have fixed pilotage rates. The sheet before me gives the compulsory pilotage rates outward: Liverpool to Bar Lightship or Horse Channel Fairway Buoy. So far as the present case is concerned the rate is Liverpool to Bar Lightship. The evidence shews that the pilot in this case was taken to pilot the ship to the Bar Lightship. The master said in his evidence that the pilot wanted to be engaged to take the ship to Point Lynas, but that he had replied that he wanted him to take the ship to the Bar Lightship—that he had another man. Some pilotage cards were put in—one dealing with pilotage to the bar and the other with pilotage from the Bar Lightvessel—and it seems clear that the Bar Lightship is at present treated as the place where vessels are to be taken to. The matter, therefore, as far as the facts are concerned, I have dealt with, and the question comes to be, what is to be the law applicable to the case? I do not regard the case as on all-fours with the two cases which counsel for the defendants relied on. The first of those two cases is that of *General Steam Navigation Co.* v. *British and Colonial Steam Navigation Co.* (1) Shortly stated, it was the case of a ship coming up the Channel to London and taking a pilot at Dungeness. Before reaching Gravesend, whilst the vessel was still under the control of the pilot, she came into collision with another ship through the pilot's negligence. The defendants' ship belonged to the port of London, and there was a question as to where the port of London extended. But the substance of the case, so far as it has any bearing on the present case,

(1) L. R. 4 Ex. 238.

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was this, that she was in a district in which she was bound to take a pilot to Gravesend, when she took him on board, and to pay him to Gravesend; that when she got to a certain distance she was within the exemption of vessels navigating within their own port; so that, as soon as she passed across a certain imaginary line, she was not, in the strict sense, under compulsory pilotage. It was held that, there having been an obligation to take a pilot on board to begin with, and to pay him up to the end, and he remaining in charge as pilot, the shipowner was not responsible for the collision which took place. It is shortly put by Byles J., who delivered the judgment of the Court, as follows: "If the master of the defendants' ship wanted to go to Gravesend, or beyond, he could not take a pilot for a shorter distance. It was compulsory on him to take a pilot for that distance at least. The pilot could insist on being paid all the way to Gravesend, and could insist on being carried to Gravesend. There had been in effect a contract between the captain and the pilot that the pilot should go to Gravesend, should be paid to Gravesend, and should act as pilot to Gravesend." Then he says: "Suppose a storm, a fog, or other emergency to have arisen endangering the life, not only of the crew, but of the pilot himself, surely the pilot could have insisted not only on being carried to Gravesend, but on piloting the vessel thither according to his contract. It is plain that during the first portion of the transit between the Downs and Gravesend, the relation of master and servant did not exist between the owner of the defendants' vessel and the pilot; and we cannot see any indication of a fresh contract as to the latter portion of that transit."

The other case is that of *The Charlton*. (1) I summarise the facts as they strike me. The defendants' pilot was employed to take the ship out of Bristol. She was going to Cardiff. The pilotage was compulsory in the port of Bristol, which did not extend as far as the place of the collision. But the Bristol Channel district extended to further than the place of collision, and the pilot had a licence which covered the port of Bristol

(1) 8 Asp. M. L. C. 29, at p. 30.

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and the Bristol Channel district. So the collision took place in a district in which the pilot was licensed to act; he had been originally taken on board under compulsion; he was paid a rate fixed for the whole district; and practically that case appears to me to be on all-fours with the case of the *General Steam Navigation Co.* (1) I do not think it is put in quite the same way in the judgment, though there are some passages which would seem to do so. But even if it is not so put, there is a distinction between that case and the point raised in the present case, because the Master of the Rolls (Lord Esher) in the course of his judgment said: "Then, looking at this statute, and the order of 1891, when the vessel had passed out of the port of Bristol, when she had gone through the port and was outside the port, I have no doubt myself that he was no longer a compulsory pilot. Therefore, when the accident happened he no longer was a compulsory pilot. But when he was taken on board this ship and put in charge he was a compulsory pilot, and although he had passed out of the limits where he was a compulsory pilot, he still was in charge as pilot, and in charge without any alteration of the relations between himself and the master of the ship. He was still the pilot. He was in charge of the ship, for they had not gone to such a place as that he was no longer a licensed pilot. He was in the district where he was a licensed pilot, and although he had gone beyond the port where he was a compulsory pilot, it is under such circumstances that the master could not properly be called upon to determine whether the compulsion had ceased or not. Then the necessities of the case require that you should not make him a servant of the owners when they had no real opportunity of determining whether he was or was not their servant. They were compelled to take him without his being their servant, and they had no real opportunity of seeing that that relationship which had been put upon them had ceased." Apart from the question of payment, there is this, that the pilot was still a pilot acting within a district for which he was licensed, and the Court held in the circumstances that the case came within the section of the Merchant Shipping Act which

(1) L. R. 4 Ex. 238, at p. 246.

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exonerates the shipowner. There is a considerable distinction, I think, at the outset, between that case and this particular case, because the pilot here was duly licensed to act as a pilot of the first-class for the port of Liverpool. Now, if one read those words in a very strict sense, that would be only in the port of Liverpool. But having regard to the Act of 1858, it does not seem to me possible to read those words with such a restricted meaning, because the pilot has to take the ship out of the port of Liverpool to a point outside it; and on coming in, for instance, the master of a ship is bound to employ a pilot from the pilot stations fixed by by-laws, and I think, if I remember rightly, one of those is right out at Great Ormshead, and another is at Point Lynas. So, to take a vessel in or out, the pilot must act partly outside the port. Therefore his licence means to do those duties which are necessary for the purpose of navigating a vessel into and out of the port of Liverpool. But that is all. Then, going out, the pilot has to take the ship to a certain distance, and there his duties cease, and he does not become a pilot licensed for a district at that point at all. He is licensed to a point in a certain place, and this Act is not like those Acts which refer to Bristol and London, where I think it will be found that persons navigating the districts must be qualified. So those cases do not seem to me to be in point in the present case.

That still leaves a very important question to be determined —namely, whether this pilot was still acting compulsorily in charge of the ship because of the state of things which exists at the present day. I do not think it necessary to decide this case upon the point which counsel for the defendants raised. Although I have pointed out the great distinction between the present case and those cases to which they referred, and which distinction may perhaps be considered in some other case—for the present purpose I think those points are not material. The reason I have come to that conclusion is this: I do not think that the strict construction which counsel for the plaintiffs put upon s. 127 of this Act can be maintained. If it is construed strictly, as they proposed, the limit to which a pilot has to go is the Fairway Buoy of the Queen's Channel—

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in other words, a spot where the Fairway Buoy rested in the year 1858. To my mind that construction would be unreasonable, and not within the fair contemplation of those who must have framed this section, and not within that which is necessary for the purpose of working out the subject with which we are dealing, namely, the employment of pilots. My reasons are these: Construed strictly—and if you once construe it strictly, you must do it entirely strictly—the Fairway Buoy of the Queen's Channel would be that which was then there. Of course that cannot be. The buoy has been removed. But if construed strictly it must mean the identical spot when the Act received the Royal assent. That cannot be so, because we are dealing with a port which has a well-known estuary, where there are banks of sand, which, I suppose, from time immemorial have been existing and shifting in a great variety of ways, and probably, from the nature of the locality, extending and silting up the port and rendering necessary what has been done, namely, the dredging of a deep cut out to the bar. It seems clear to my mind that the bar has gradually extended itself. The Fairway Buoy was placed to mark the Queen's Channel. That Fairway Buoy means a buoy which shews you are well out of the channel and clear of danger. If the bar extends from time to time, the Fairway Buoy must inevitably be moved, by those who have charge of the entrance of the port, to suit the state of the channel. What, then, is the legitimate conclusion to draw? I think it is that, although that buoy has been moved, something has taken its place, namely, the Bar Lightship, which, although not a buoy in the strict sense, is the substitute, to my mind, for the buoy. It is remarkable to find, and I hope I have made it clear in stating its position, that it is placed, having regard to the state of the bar, in almost the same position as the Fairway Buoy occupied with regard to the channel which it was intended to guard. That is the explanation, I have not the least doubt, why the lightship is now treated as being the boundary to which the pilots have to go, why the rates are stated in the pilot sheet to be Liverpool to the Bar Lightship, and why the contract is made in

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such a form as to be a contract to take the ship out to the Bar Lightship.

I think that is the reasonable interpretation to place upon this Act, having regard to the necessary shifting of the place and the nature of the exigencies which have to be dealt with; and it is shewn by those conversant with the locality that that is the manner in which the matter is acted upon. To my mind the evidence of the pilot, that practically they go to the Lightship, really tends to establish that position. The result, therefore, is that the pilot was still compulsorily in charge at the time when the collision took place. That answers the whole of the questions raised in this case, and my judgment must be in favour of the defendants.

Solicitors for plaintiffs, the owners of the *Gladestry*: *Botterell & Roche.*

Solicitors for defendants, the owners of the *Sussex*: *William A. Crump & Son.*

T. L. M.

[IN THE CONSISTORY COURT OF LONDON.]

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Feb. 12;
March 30.

THE RECTOR AND CHURCHWARDENS OF ST. LUKE'S, CHELSEA *v.* WHEELER.

Ecclesiastical Law—Faculty—Faculty for the erection of Communion Table constructed of Wood and mounted on castors but with the front and sides covered with detachable frames of Slate containing Marble Mosaics—Church Furniture—Canon 82 *of* 1604—"*Carpet of Silk or other decent Stuff.*"

A movable marble Communion Table is not a legal article of Church furniture; but a faculty may, in the discretion of the Ordinary, be granted for a movable wooden Communion Table, on the front and sides of which are suspended slabs of slate decorated with marble mosaics and detachable at will without damage to the Table.

The rector and one of the churchwardens of a parish church, who had petitioned the Chancellor of the diocese for a faculty for the introduction into the chancel of the church of a movable Communion Table of marble, by leave of the Court brought in a supplementary petition whereby they prayed that, instead of a faculty being granted for the Communion Table proposed by their original petition, they might be authorized to place in the chancel of the church a movable Communion Table of wood standing on castors, with licence to suspend by wooden screws on the front and sides of the table thin slabs of slate decorated with marble mosaics. The prayer of this supplementary petition was not opposed; and at the hearing of the suit it appeared that the proposed decorated slabs of slate would be detachable at will without damage to the table and be in keeping with the decorations of the rest of the chancel, and that the whole of the surface of the proposed table would be of wood, and no marble mosaic of any kind would rest thereon:—

Held, that a faculty could be granted authorizing the proposed wooden Communion Table to be placed in the church with the slate slabs decorated with marble mosaics suspended on the front and sides of the table in the manner proposed in the supplementary petition.

THIS was a cause of faculty instituted on behalf of the Venerable H. E. J. Bevan, Archdeacon of Middlesex, the rector, and T. C. J. Robinson and George Collins, the churchwardens of the parish of St. Luke's, Chelsea, in the county of Middlesex and diocese of London, for the purpose of obtaining a faculty to authorize the placing of a new Communion Table in the chancel of the church of St. Luke's, Chelsea, in lieu of the

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Communion Table there standing at the commencement of the suit.

The original petition filed in the suit prayed for a faculty to erect in the church a movable marble Communion Table, and although it was objected in the Registry that the grant of a faculty for that purpose would be contrary to ecclesiastical law (1), a citation was ultimately issued therein on the representation of the petitioners that they were desirous that the case should be decided after evidence had been taken in Court at the hearing. An appearance to this citation as opponent was entered for John Jackson Wheeler, a parishioner of St. Luke's, Chelsea.

On February 12 last the suit came on for hearing before the Chancellor of the Diocese of London (Dr. Tristram, K.C.), and, after the rector and another witness on behalf of the petitioners and the opponent on his own behalf had been examined, leave, on the application of counsel for the petitioners, was given for a supplementary petition to be brought in asking for the introduction into the church in substitution for the marble Communion Table referred to in the petition originally filed of a Communion Table of wood with, on its front and sides, ornamental mosaic slabs; for the issue of a fresh citation, and for the adjournment of the hearing.

A supplementary or amended petition signed by the rector of St. Luke's, Chelsea, and T. C. J. Robinson, one of the churchwardens (the other churchwarden, party to the original petition, having died since the institution of the suit), was brought in in pursuance of the above leave; and set forth that at a vestry of the parish, held February 29, 1904, a resolution was passed to the effect that an amended petition should be presented to the Consistory Court of London praying for a faculty to place in the chancel of St. Luke's Church, Chelsea, "a movable Holy Table of wood standing on brass castors, with licence to your petitioners to suspend by thin slabs of slate, on the front and sides thereof, marble mosaics in keeping with the marble decorations of the chancel and pulpit of the said church,

(1) See *Faulkner* v. *Litchfield*, (1845) 1 Roberts. 184; *Liddell* v. *Beal*, (1857) Moore's Special Report, 176-89.

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provided that the whole of the surface on top of the Holy Table shall be of wood, and no marble mosaic of any kind should rest thereon." It then stated that a plan shewing in perspective the design of the proposed Communion Table, and a design shewing the pattern of the marble mosaics proposed to be suspended on the front and sides of the Communion Table, had been exhibited to the vestry before the above resolution was passed and were annexed to the supplementary petition; and further alleged in paragraphs 4 to 8 inclusive, in substance, as follows :—

4. The cubic capacity of the wood contained in the proposed Communion Table consists of not less than twenty-eight cubic feet.

5. The cubic capacity of the proposed marble mosaics does not exceed four cubic feet.

6. The suspension of the said mosaics will be purely decorative. They will be movable at will without damage to the said Holy Table, and will constitute no part of the structure of the said wooden Holy Table, nor will they form part of the support thereof. On the contrary, they will be supported by the said wooden Holy Table.

7. No picture, words, or device of a superstitious, idolatrous, or Romish origin or suggestion are or will be introduced into the said design annexed to the petition shewing the pattern of the proposed marble mosaics, which design has been made to harmonize and agree with the decorative surroundings of the proposed Holy Table.

8. The Holy Table will not constitute an altar of stone which cannot be burnt, but will be (save and except the said decorations and castors) wholly inflammable. Except to fasten the castors, there will be no metal nails or metal screws in the leaves or legs or top or in any part of the structure of the Holy Table; but the same will be joined by wooden bolts, and the said decorations will be suspended on large wooden screws, and will not be cemented or made otherwise adhesive in any way to the said wooden Holy Table.

The supplementary petition then went on to state that the

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cost of the said Holy Table, estimated at between 300*l.* and 400*l.*, would be defrayed out of a fund subscribed for by the parishioners of St. Luke's, Chelsea, as a testimonial to the late Rev. Gerald Blunt, rector of the parish, and instrumental in introducing marble decorations to the said church, and who had before his death seen and approved of a Holy Table decorated as proposed, and concluded with a prayer that the Court would decree a faculty to issue authorizing the petitioners to place in the chancel of the church of St. Luke's, Chelsea, a movable Holy Table of wood, as shewn on the plan annexed to the supplementary petition, standing on brass castors, with licence to the petitioners to suspend by wooden screws thin slabs of slate on the front and sides thereof, decorated with marble mosaics, as shewn on the design annexed to the same petition, the whole of the top of the Holy Table to be of wood, and no marble mosaics to be placed thereon.

After the presentation of the supplementary petition, a fresh citation was duly issued and served, but no appearance was entered thereto.

1904. March 30. The suit came on again for hearing before the Chancellor of the Diocese of London.

The churchwarden who had signed the supplementary petition and a member of the firm of stonemasons who had designed the marble mosaics for the proposed Communion Table were called as witnesses on behalf of the petitioners, and gave evidence in support of the averments in the supplementary petition.

Arnold Statham, for the petitioners. The introduction of a fixed marble altar or Communion Table into a church of the Church of England would be clearly illegal: *Faulkner* v. *Litchfield* (1); *Liddell* v. *Beal* (2); *Durst* v. *Masters* (3); Phillimore's Ecclesiastical Law, p. 724; but it may be doubted whether a movable marble Communion Table would be subject to the same objection.

(1) 1 Roberts. 184. (2) Moore's Special Report.
(3) (1875-6) 1 P. D. 123, 373.

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[DR. TRISTRAM. The Judicial Committee of the Privy Council came to the conclusion in *Liddell* v. *Beal* (1) that the Communion Table in churches of the Church of England should be of wood; and in fact for the last two centuries Communion Tables have always in practice been made of wood.]

The conclusion came to in that case was, it is submitted, not a decision that a Communion Table must be of wood, but rather that a wooden table would be approved by the Judicial Committee. However, in the present case the proposed table will be substantially of wood, will be movable, and inflammable, so that the idea of any similitude to an altar will be absent, whilst the marble mosaics on its front and sides are detachable at will, and the Table does not cease to be a wooden table by reason of its being so decorated. The Court, therefore, ought in its discretion to grant the faculty just as it would if the table had been decorated with embroidery, there being no decision that a Communion Table would be forbidden by law unless it was entirely constructed of wood without any decoration.

No person appeared to oppose the faculty prayed for.

DR. TRISTRAM. In this case in August, 1903, the rector and churchwardens of St. Luke's, Chelsea, filed a petition praying the Court to issue a faculty authorizing the erection of a Holy Table of marble in the chancel of the church of St. Luke's in lieu of the present Holy Table, as being too small for the church.

On the petition being submitted to me, I intimated to the rector that my issuing such a faculty as the petition prayed for would be in direct contravention of the decision of the Judicial Committee of the Privy Council in the case of *Liddell and Others* v. *Beal* (1) (the St. Barnabas, Pimlico, case). On learning that, both the rector and churchwardens represented that they had caused the petition to be filed under the impression that the marble Holy Table was a legal piece of church furniture, inasmuch as one had been erected some years ago in

(1) Moore's Special Report.

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the church of Holy Trinity, Upper Chelsea, on its being rebuilt, of which parish Archdeacon Bevan had been for some time vicar prior to his removal to St. Luke's, Chelsea. I was also informed that the proposed marble Holy Table was intended as a memorial to the late Rev. Gerald Blunt, who had been rector of this parish for upwards of forty years, by the parishioners, by whom he was greatly valued and loved, who had subscribed from 300*l.* to 400*l.* for the purpose, most of which had been already expended in carving a frontal and side pieces in marble on the assumption that there was no legal objection to a marble Holy Table, and that under the circumstances the petitioners were anxious to have the facts of the case brought before the Court. I accordingly indorsed my fiat for the issue of a citation.

After the publication of this citation on the church door, Mr. John Jackson Wheeler, a parishioner of St. Luke's, Chelsea, entered an appearance in the suit, and prayed to be heard in objection to the grant of a faculty for the introduction in the church of a marble Holy Table.

The case came on for hearing on the 12th of February last. Mr. Statham, who appeared as counsel for the rector and churchwardens, stated that he had advised his clients that the Court would not be justified in granting a faculty for a marble Holy Table in the face of the decisions in the cases of *Faulkner* v. *Litchfield* (1) in the Arches, and of *Liddell* v. *Beal* (2) in the Judicial Committee, and suggested that he should be instructed to apply for, and on their agreeing thereto applied for, leave to amend the petition by substituting therefor a petition for the introduction of a Communion Table made of wood with ornamental mosaic slabs placed in front and by the sides of the table, as being in keeping with the rest of the chancel, which was composed of marble. On this Mr. Wheeler stated that he would consent to such a faculty being granted; and thereupon the Court granted the petitioners leave to bring in a supplementary petition accordingly. This has now been done, and the case is again before the Court for decision. The question of the legality of substituting a stone altar for a

(1) 1 Roberts. 184. (2) Moore's Special Report.

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Communion Table of wood has been raised in two cases: firstly, in the case of *Faulkner* v. *Litchfield and Stern* (1) in the Arches in 1845, in which Sir Herbert Jenner Fust held that the Communion Table should be composed wholly of wood and movable, and that a Communion Table of stone was not a Communion Table within the meaning of the rubrics of the Book of Common Prayer; and, secondly, in the case of *Liddell and Others* v. *Beal* (2), on appeal from the decisions of Dr. Lushington in the Consistory Court of London and of Sir John Dodson in the Arches to the Judicial Committee of the Privy Council, composed of Lord Chancellor Cranworth, Lord Wensleydale, The Right Hon. T. Pemberton Leigh (afterwards Lord Kingsdown), The Right Hon. Sir John Patteson, The Right Hon. Sir William Maule, the Archbishop of Canterbury (Dr. Sumner), and the Bishop of London (Dr. Tait) (3), in which their Lordships affirmed the judgment of Sir Herbert Jenner Fust in *Faulkner* v. *Litchfield*. (1) As the report is out of print and difficult of access, and repeated applications have been made of late to me to sanction the introduction by faculty of stone or marble Communion Tables, it may be convenient that I should here state the main grounds on which the Judicial Committee rested their judgment on this question, and on which I have in this, as in previous cases, refused to grant a faculty for the introduction of a stone or marble Communion Table or altar in a church or chapel.

With respect to the appeal of *Liddell and Others* v. *Beal* (2), their Lordships said: "St. Barnabas is a chapel of ease within the district chapelry of St. Paul, of which the curates are appointed by Mr. Liddell. In this case both the chapelwardens agree with Mr. Liddell as to the ornaments in question. On the 17th January, 1855, a monition was issued against them, at the instance of Mr. Beal, an inhabitant of the district chapelry of St. Barnabas, by which they were monished to remove from the said chapel" (amongst other things) "the stone altar and the cross ornamented with jewels elevated thereon, and fixed thereto." The answer in substance ". . . .

(1) 1 Roberts. 184. (2) Moore's Special Report.
(3) See Moore's Special Report, 132, 176–89.

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admits the existence of a stone table, or altar, with the metal cross attached thereto, and it insists that the article of furniture so described is 'mensa congrua et decens' within the meaning of the Canons, and is such a Communion Table as is required by law for the celebration of the Holy Communion. . . . This article of church furniture consists of a marble slab, with a super-altar on the side nearest to the wall of the chapel. It stands apart from the wall, supported upon stone carved arches, the arches resting upon a stone plinth, which is let into and embedded in the pavement on which it stands. The cross is attached to the super-altar, and stands between two large candlesticks which are movable. The question is whether this structure is a Communion Table within the meaning of the law. The Appellants in their pleadings term these tables 'Altars or Communion Tables'; and in the argument they have referred to two recent statutes, in which the word 'Altar' is used to signify the 'Communion' Table. When the same thing is signified, it may not be of much importance by what name it is called; but the distinction between an Altar and a Communion Table is in itself essential and deeply founded, in the most important difference in matters of faith between Protestants and Romanists, namely, in the different notions of the nature of the Lord's Supper which prevailed in the Roman Catholic Church at the time of the Reformation, and those which were introduced by the Reformers. By the former it was considered as a sacrifice of the body and blood of the Saviour. The Altar was the place on which the sacrifice was to be made; the elements were to be consecrated, and, being so consecrated, were treated as the actual body and blood of the victim. The Reformers, on the other hand, considered the Holy Communion not as a sacrifice, but as a feast, to be celebrated at the Lord's Table; though as to the consecration of the elements and the effect of this consecration, and several other points, they differed greatly amongst themselves. This distinction is well pointed out in Cudworth's Discourse, concerning the True Notion of the Lord's Supper, ch. v. p. 27. . . . . That the Roman Catholic altars are constructed with a view to this doctrine of sacrifice admits of no doubt. Cardinal

Bona and others speak of them in these terms. It is there stated that altars originally were made indifferently of wood or of stone, but that many centuries ago the Church ordered that they should be only of stone.

". . . . The distinction between the Supper of the Lord and the Sacrifice of the Mass is set forth in great precision" [in the 28th and 31st] "Articles agreed upon in Convocation in the year 1562. . . .

"This change in the view taken of the nature of the Sacrament, naturally called for a corresponding change in the ancient Altar. It was no longer to be an Altar of sacrifice, but merely a Table, at which the communicants were to partake of the Lord's Supper. . . . ."

The Injunctions of Queen Elizabeth, issued in the first year of her reign, 1 Card. Doc. Ann. p. 210, "plainly shew that the Communion of the Lord's Supper was to be held at a Table, as distinguished from an Altar, a Table in the ordinary meaning of that term; that as by the Rubric the bread used was to be "the ordinary bread eaten at table with other meats," so the Table was to be of the character of those employed on such occasions; that it was not only to be movable, but was from time to time to be moved. The 82nd canon of 1604, that which is now in force, introduces no material alterations; it assumes the existence in all churches of convenient and decent Tables for the celebration of the Holy Communion, and provides that they shall be kept in repair. It orders 'that the Table be covered in time of Divine Service with a carpet of silk or other decent stuff thought meet by the Ordinary, and at the time of the ministration with a fair linen cloth as becometh that Table.'

"Since this period no alteration has been made in the law with respect to the nature of the Table to be used. The Rubric of the present Prayer Book provides only that at the Communion time, the Table having a fair white linen cloth upon it, shall stand in the body of the Church or Chancel, where Morning and Evening Prayer are appointed to be said. . . . . The term 'Altar' is never used to describe it, and there is an express declaration at the close of the service against

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the doctrine of transubstantiation, with which the ideas of an Altar and sacrifice are closely connected.

"Under these circumstances, the first question is, whether the stone structure at St. Barnabas is a Communion Table within the meaning of the Canons and the Rubric; and their Lordships are clearly of opinion that it is not. The case is within the principle of Sir Herbert Jenner Fust's decision in *Faulkner* v. *Litchfield* (1), from which, indeed, the present proceeding is in effect an appeal. In the elaborate judgment in that case the whole subject is discussed with a learning and ability which make it useless on the present occasion to go further than their Lordships have already done into the authorities. The decree complained of in the appeal of *Liddell* v. *Beal* (2) has ordered the Church or Chapel-wardens of St. Barnabas to remove the present structure of stone used as a Communion Table, and to provide instead thereof a movable table of wood. Their Lordships had at first some doubt whether the law had prescribed of what material the table should be made; but on further consideration they are satisfied that the opinion expressed by Sir Herbert Jenner Fust, and adopted in the decree in this case, is well founded.

"The term 'Table' and the corresponding Latin word 'mensa,' especially when it is considered for what purpose it was to be used, naturally import a table of the material of which tables are ordinarily made. The Communion Table was to be provided by the parish, was to be movable, not by machinery, but by hand; and was actually to be very frequently moved. Wood is a lighter and cheaper material than stone, and the circumstance that the old Altar was necessarily of stone would be an additional reason with the Reformers for requiring that the Table should be of wood. The Canons of 1571 expressly provide that it shall be of that material—'Mensa ex asseribus compositè juncta'; and although those Canons, not having received the Royal assent, were not of themselves of binding force, it is probable that they were generally acted upon, and they sufficiently shew what was at that time understood to be the proper material of the Table

(1) 1 Roberts. 184. (2) Moore's Special Report.

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which, under the Act of Elizabeth and the Regulations of Edward the Sixth, was to be substituted for the Altar.

"The Canons of 1604, which are now in force, do not contain any provision upon this point. They speak of Communion Tables as things which already exist in Parish Churches, and provide for their repair, and give minute directions as to the covering to be used. If any doubt had existed at that time as to the material of the table itself, it is not probable that the Canons would have omitted all notice of this question. Their Lordships, therefore, are satisfied that the decision upon this point in *Faulkner* v. *Litchfield* (1) is well founded, and they must advise Her Majesty that the decree as to the removal of the stone structure at St. Barnabas, and the Cross upon it, and the substitution of a Communion Table of wood, ought to be affirmed."

The only question that remains for my consideration is, whether as Ordinary under the special circumstances of this case I should be justified in allowing under the 82nd canon of 1604, which orders that the table be covered in the time of divine service with a carpet of silk, or other decent stuff thought meet by the Ordinary, and at the time of the ministration with a fair linen cloth as becometh that table, in allowing marble mosaics to be suspended on the front and sides of the wooden Holy Table now proposed to be introduced into the church of St. Luke's, Chelsea. According to the plan of the new Holy Table, it would be incongruous that the front and sides should remain exposed to view. In such cases the lower part of the table is now generally but not necessarily hid from public view during the celebration of Holy Communion as well as at other times by some ornamental embroidered material, and the question is, whether under the words of the canon the material might be of mosaics. This depends upon the construction to be put upon the words "other decent stuff" thought meet by the Ordinary. On referring to Walker's Dictionary, I find it is stated that the word "stuff" is a generic term signifying material, and in Dr. Johnson's Dictionary the meaning given is "a material out of which anything can be

(1) 1 Roberts. 184.

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made." There is also scriptural authority for giving this signification to the word "stuff"; for in Exodus, ch. xxxvi., v. 7, in reference to the material of which the Tabernacle was ordered to be constructed, are these words, in both the Old and Revised Version: "For the stuff they had was sufficient for all the work"; and in ch. xxxv., vv. 20–28, the materials presented to be used in the work included silver, brass, precious stones, and spun articles of blue and purple and scarlet, and various other articles. On these authorities, and as there will be a provision in the faculty in accordance with the petition, that no marble mosaic is to rest on the top of the Table which is to be wholly of wood, under the special circumstances of this case, I consider that I am justified, as Ordinary, in sanctioning these slate slabs, decorated with marble mosaics, being placed at the front and sides of the new Holy Table in the manner proposed. I reject the prayer of the original petition to issue a faculty authorizing a movable Holy Table of marble to be placed in the church in lieu of the present Holy Table for the reasons I have stated, and I decree a faculty to issue authorizing a new wooden Holy Table to be placed in the church as prayed in the supplementary petition, in accordance with the plans filed in the Registry, with the slate slabs suspended on the front and sides of the table in the manner proposed.

With regard to the representation made by the petitioners in the course of this case that a marble Holy Table had been erected in the church of Holy Trinity, Chelsea, on its being rebuilt some years ago, I wish to mention that before such rebuilding an application was made to this Court to have the old church pulled down and a new church erected on the same site, but that no order was made by the Court as to the decoration of the church, and that I have ascertained on looking at the documents and papers relating to the consecration of the new church that neither in the petition for consecration nor in the sentence of consecration itself is there any special mention of the Holy Table or other church furniture which had been introduced into the church. Consequently Archbishop Temple, who consecrated the church, had he

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known of the existence of a marble altar in the church, or any other supposed illegal ornament, would have referred the matter to me, and might have declined to proceed with the consecration until the altar had been removed. I should add that the marble altar in question might at any time be removed by the order of this Court on the petition of any parishioner, as was done in the case of *Liddell* v. *Beal* (1), after consecration.

Solicitors for petitioners: *T. J. Robinson & Son.*

C. F. J.

IN THE ESTATE OF JEANNE THEODORA GROOS.

1904

May 2, 12.

Probate—Practice—Foreign Domicil, Will, and Marriage—English Domicil subsequently acquired—Wills Act, 1861 (24 & 25 *Vict. c.* 114), *s.* 3—*Construction.*

The 3rd section of the Wills Act, 1861, the title of which is, "An Act to amend the law with respect to wills of personal estate made by British subjects":—

Held (by Gorell Barnes J.), not to be limited in its operation to the wills of British subjects, but to extend to the will of a foreign testatrix, made before her marriage, and in strict conformity with the law of her foreign domicil at that time; according to which, marriage does not revoke a will:

Held, further, that the English domicil acquired by the testatrix after the date of the will and after the date of the marriage did not affect the question of the validity of the will, but that, as the will in terms provided (in accordance with the law of the former domicil), that the executorship should be limited to the space of one year, the grant of probate must be limited to one year from the date of the death of the testatrix.

MOTION FOR PROBATE.

Jeanne Theodora Groos, late of 12, Farquhar Road, Upper Norwood, in the county of Surrey, died on November 7, 1903, leaving her surviving Carl Wilhelm Groos (the plaintiff), her natural and lawful husband, and the five defendants, her natural and lawful children and only next of kin.

The plaintiff was married to the deceased on November 19,

(1) Moore's Special Report.

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1868, at Utrecht, in the kingdom of Holland. The said marriage was celebrated in all respects in accordance with Dutch law, the husband and wife being at the time Dutch subjects domiciled in Holland.

On November 12, 1868, marriage articles in the Dutch language and in the form required by Dutch law were duly executed by the plaintiff and the deceased (then Jeanne Theodora Kol) before a notary of the city of Utrecht, and the said articles were in all respects valid and binding by Dutch law.

On the said 12th day of November, 1868, and after the execution of the said marriage articles, the said deceased made her last will and testament before a notary of the city of Utrecht and in accordance with all the formalities required by Dutch law.

By her said will the deceased appointed the plaintiff as the heir of her estate, with the reservation only of the legitimate portion or share which by law would devolve upon her relatives in a direct line, in so far as they might be living at her death and be competent to inherit from her; and, in the event of the plaintiff not being the sole heir of her estate, she appointed him executor of her will with the right of possession of all her effects movable and immovable forming her estate during one year after her decease.

At the period of the marriage the plaintiff was ordinarily resident in London, but such residence was, at that time, said to be merely for business purposes, and he had not then finally abandoned his domicil in Holland; but in or about the year 1889 he did abandon that domicil, and from that time onwards he, and consequently the deceased, acquired a domicil of choice in England.

By the law of Holland, marriage does not revoke a will. Also, a married woman has no power, by will or otherwise, to deprive her natural and lawful children of their legitimate portions; and, upon the death of a married woman, who leaves her lawful husband and natural and lawful children her surviving, her property is divided as follows: If she die intestate, her children take the whole of her property equally between

them. If she leave a will, the children are entitled to a certain proportion of her property, which varies according to the number of children and is called their "legitimate portion": if three or more children survive the testatrix, such portion consists of three-fourths of the amount which each would have inherited under an intestacy.

The facts relating to Dutch law were proved by the affidavit of a Doctor of Laws of the University of Leyden.

The plaintiff now moved for probate, or for a grant of letters of administration with the will annexed.

The motion first came on before the President (Sir F. H. Jeune) on March 28, when his Lordship directed that notice should be given to the children.

A consent to probate, dated April 20, 1904, signed by all of them, was now filed.

Cassel, moved the Court on behalf of the plaintiff, the husband of the deceased. Sects. 1 and 2 of Lord Kingsdown's Act deal, in terms, with wills of British subjects. The testatrix was not a British subject, though her domicil at the time of her death was in England. The question arises under s. 3 of the Act, which does not, in terms, refer to British subjects. There is no express authority on the construction of s. 3, but there are dicta of text-writers: Dicey on the Conflict of Laws, 696 (also 698, note); Westlake on Private International Law, 3rd ed. par. 85, at p. 104. The title to the Act should not be held to limit the more general application of s. 3: *Jeffries* v. *Alexander* (1); *Claydon* v. *Green* (2); May's Parliamentary Practice, 10th ed. p. 462; *Kenrick* v. *Lawrence* (3); Wilberforce's Statute Law, pp. 274 to 276; *Fielden* v. *Morley Corporation*. (4) In the present instance, there is every reason for not giving effect to the title, because unless the Court construes s. 3 as extending to all persons to whose wills English law is applicable, there is really very little for that section to operate upon, inasmuch as the preceding sections would have the same effect certainly upon all wills made by British subjects out of the United Kingdom.

(1) (1860) 8 H. L. C. 594, at p. 603, n.
(2) (1868) L. R. 3 C. P. 511, 521.
(3) (1890) 25 Q. B. D. 99, 104.
(4) [1899] 1 Ch. 1, 3.

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[GORELL BARNES J. The registrar has called my attention to *Bloxam* v. *Favre*. (1)]

That did not arise under s. 3 at all. It was decided under one of the earlier sections.

Cur. adv. vult.

May 12. GORELL BARNES J. (after stating the facts and reading a notarial translation of the will). The point for my determination is whether the change of domicil renders the will bad on account of the marriage, which took place after the execution of the will. The argument addressed to me was based on the Act of 1861 (24 & 25 Vict. c. 114). The 3rd section of that Act is as follows: "No will or other testamentary instrument shall be held to be revoked or to have become invalid, nor shall the construction thereof be altered, by reason of any subsequent change of domicil of the person making the same." It was argued that under this section a change of domicil did not effect a revocation of the will. The section appears in and forms part of an Act which applies, according to its title, to the wills and estates of British subjects.

The question raised is as to whether s. 3 applies to this case. In other words, does the section apply generally, or is it limited to British subjects?

After looking into the authorities, I have some doubt whether, apart from s. 3, this will should be treated as invalid, inasmuch as it was a good will at the time it was made and valid as long as the parties were domiciled in Holland. Under these circumstances, might it not reasonably be held that the will remained valid up to the time of the change of domicil, and that it ought not to be treated as invalidated subsequently owing to change of domicil? To hold otherwise would be equivalent to saying that the law of the after-acquired domicil was to work back and affect a will at a time when the law of the country where the will had been made shews it to have been a good will.

Having considered the authorities, I hold that s. 3 of the Act may reasonably be construed as applicable to a case such as this. That so to hold is a matter of convenience cannot

(1) (1884) 9 P. D. 130.

be doubted. That the case may be held to be within the general terms of s. 3 is equally beyond doubt. And it does not seem reasonable to hold that in this case s. 3 is to be limited merely because, in the title, the Act is described as an Act to amend the law with respect to wills of personal estate made by British subjects. I am of opinion that the Act ought not to be construed in the restricted sense. This will may, therefore, be admitted to probate.

There is, however, this further point to be considered. The affidavit of the Dutch lawyer is rather vague as to the position of executor. He states: "Under the laws and constitution of the kingdom of the Netherlands the executor of a will is not seised of the property of the deceased and has, therefore, no title for obtaining possession of the goods which he has to distribute. For that reason the testator is legally entitled to give the executor of his will the possession of the whole of his inheritance, or of a certain part thereof; but it is provided by law that such possession shall on no account exceed the period of one year from the date on which the executor obtains such possession. Thereby he is enabled to exercise all the rights of the deceased: he can sue for the payment of debts due to the estate and distribute the same according to law. This legal year regards only such possession and not the executorship itself. An executor who has once consented to act as such is bound to remain an executor until he has fulfilled all his duties." That statement is a little ambiguous, but it seems to shew that there is power in Holland to appoint an executor so as to give him possession of the whole inheritance, but with the restriction that the period of possession be limited to one year. Having regard to the terms of this will, which contains that restriction, and that, from the fact of there being children who take their legitimate portions, he is not the sole heir, the grant must go to this executor in a limited form—limited, that is, to the expiration of one year from the date of the death of the testatrix.

Solicitor: *A. W. J. Groos.*

H. D. G.

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May 2, 11.

EVANS *v.* EVANS AND BLYTH.

Divorce—Variation of Settlement—Child—Question of Legitimacy—Issue directed.

On a petition for variation of settlements after a decree for dissolution of marriage, where a child had been born between the date of the decree nisi and decree absolute, the paternity of which the petitioner denied, the Court, on the application of the petitioner, directed an issue to be tried to ascertain the status of the child, and postponed the further consideration of the variation of settlements until after the trial of the issue.

In the Matter of the Petition of Chaplin, (1867) L. R. 1 P. & M. 328, *Pryor* v. *Pryor and Shelford*, (1887) 12 P. D. 165, and *Douglas* v. *Douglas and Trevor*, (1898) 78 L. T. 88, discussed.

MOTION upon the report of the registrar upon a petition to vary a marriage settlement.

The husband obtained a decree nisi in June, 1903, and the marriage was finally dissolved on December 21, 1903. The adultery proved at the hearing was said to have taken place in November, 1902, while the respondent was in Berkshire and the petitioner in Kent.

Between the date of the decree nisi and decree absolute, namely, on July 31, 1903, the respondent gave birth to a child, of which the petitioner denied paternity.

On December 30, 1903, the petitioner presented his petition for variation of the ante-nuptial settlement, and therein prayed (inter alia) that all his property comprised in the settlement might be reconveyed to himself absolutely.

On February 23, 1904, the official solicitor was, with the petitioner's concurrence, appointed guardian ad litem to the child.

On the inquiry before the registrar it was stated that the petitioner was willing to relinquish his interest in the respondent's trust funds, and the respondent did not oppose the prayer of the petition. The registrar in his report stated that, having heard the solicitors for the petitioner and trustees of the settlement, and counsel for the official solicitor, and the cases

of *Pryor* v. *Pryor and Shelford* (1) and *Douglas* v. *Douglas and Trevor* (2) having been brought to his notice, he recommended that all the powers and interests of the wife in the husband's trust funds, and, by consent, all the powers and interests of the husband in the wife's trust funds, should be extinguished; but that, inasmuch as the child in question was born in wedlock, no such order as prayed for in the petition should be made for the reconveyance of any portion of the settled funds. And he also recommended that, having regard to s. 1 of the Legitimacy Declaration Act, no further order should be made by the Court unless the official solicitor, under the circumstances of the case, considered it to be in the interest of the infant child to present a petition for declaration of legitimacy.

The petitioner gave notice of motion to vary the report by directing an issue to be tried in such form and manner as the Court should deem fit, so that the legitimacy of the child should be inquired into; and to postpone the further consideration of the report and the making of any final order thereon until after the determination of that issue.

It appeared that by the ante-nuptial settlement, which was executed on August 3, 1892, certain property was settled by the petititioner in trust for the petitioner for his life, on his death for the respondent during her life, and, on the death of the survivor, for the child or children of the marriage; and, in case no such child should attain a vested interest, for the petitioner absolutely.

The respondent, by the same deed, settled certain funds to be held in trust for herself for life, on her death for the petitioner during his life, and on the death of the survivor for the child or children of the marriage; and, in default of any child attaining a vested interest, for the respondent absolutely.

Power was given to either party to resettle a portion of his or her trust funds on a second marriage.

Barnard (*Murphy* with him), for the petitioner. If the Court directs an issue, the petitioner hopes to be able to satisfy the Court that he did not have access to the respondent

(1) 12 P. D. 165. (2) 78 L. T. 88.

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at the time when the child in question must have been conceived. The reason why the petitioner asks the Court to direct an issue to be tried is that under the Legitimacy Declaration Act no one can present a petition praying that the child may be declared illegitimate. [He relied on *Douglas* v. *Douglas and Trevor*. (1)]

Le Bas, for the respondent, did not ask for any variation in the report of the registrar.

Willock, for the official solicitor, opposed the motion. By presumption of law the child is legitimate, and it is not for the child's interest that any step should be taken. The case of *In the Matter of the Petition of Chaplin* (2) was not cited in *Douglas* v. *Douglas and Trevor*. (1) In the present instance both the petitioner and respondent are interested in trying to have the child declared illegitimate. The President (Sir F. H. Jeune) in the last-mentioned case, after his attention was called, by counsel who appeared for the trustees, to the case of *Pryor* v. *Pryor and Shelford* (3), directed the official solicitor to file a petition under the Legitimacy Declaration Act; and it is submitted that he was wrong in so ordering.

In *Mordaunt* v. *Mordaunt* (4) the Judge Ordinary (Lord Penzance) said: "In a case that was before me under the Legitimacy Declaration Act—*In re Chaplin*—an application was made for the appointment of a guardian ad litem to an infant, in order that proceedings might be instituted to ascertain the infant's legitimacy. As a decision in such a case might be very prejudicial to the infant, I directed the registrar to inquire whether it would be for the benefit of the infant that the suit should proceed, and on his report I refused to sanction the appointment of a guardian." If the official solicitor were to be ordered to file a petition under the Legitimacy Declaration Act, the Court would be only making him the instrument to enable the petitioner and respondent to bastardize the child. [He also referred to the wording of s. 5 of the Matrimonial Causes Act, 1859—". . . . for the benefit of the children of the marriage. . . ."]

(1) 78 L. T. 88.
(2) L. R. 1 P. & M. 328.
(3) 12 P. D. 165.
(4) (1870) L. R. 2 P. & M. 103, at p. 118.

[GORELL BARNES J. What steps could a husband take if his wife happened to die before decree absolute?]

Barnard, in reply. He might bring an action in the Chancery Division, as was done in *Burnaby* v. *Baillie*. (1) Counsel for the official solicitor were responsible for not bringing the authorities to the notice of the President in *Douglas* v. *Douglas and Trevor*. (2) The petitioner, who is responsible for the appointment of the guardian ad litem, is quite willing to make provision for the costs of the official solicitor if he petitions under the Legitimacy Declaration Act. If no legitimacy declaration suit be ordered, the Court should direct an issue upon the petition for variation of settlements. The petitioner ought not to be driven to institute proceedings in Chancery: to compel him to do so would be to encourage "multiplicity of legal proceedings," which it was the object of the Legislature, in passing the Judicature Act, 1873, to avoid. (3)

A further and important point in favour of deciding the question by directing an issue would be that the co-respondent would be liable for costs, whereas he would be no party to a suit under the Legitimacy Declaration Act, or to proceedings in the Chancery Division.

Cur. adv. vult.

May 11. GORELL BARNES J. This was a motion by the petitioner in a divorce suit that the Court should order and direct an issue to be tried whereby the legitimacy of the infant child of the respondent should be inquired into and determined, and, that the Court should postpone the further consideration of the registrar's report upon the petition to vary marriage settlements and the making of any final order thereon until after the result of the trial of the issue.

The facts which give rise to the motion, so far as it is necessary to state them for the purposes of my judgment, are these: The petition for divorce was presented on February 21,

(1) (1889) 42 Ch. D. 282.

(2) 78 L. T. 88.

(3) See the Supreme Court of Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 24, sub-s. 7.

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1903; the decree nisi was pronounced in June, 1903; and that decree was made absolute on December 21, 1903. According to the registrar's report, the respondent, between the date of the decree nisi and the date of the decree absolute, namely, on July 31, 1903, gave birth to a female child, of which it is alleged by the petitioner that he is not the father.

The registrar also reports that there are no other children surviving issue of the marriage.

There is an ante-nuptial indenture of settlement, which the petitioner now seeks to vary, and the report deals with certain variations which the registrar recommends; but the petitioner, as I understand, asks for a reconveyance to himself of all his property comprised in such settlement, on the ground that he is not the father of the respondent's child, and that there is, in fact, no child living issue of his marriage with the respondent.

The official solicitor represents the child, and it was at first suggested that he should be directed to file a petition under the Legitimacy Declaration Act, so as to have the question of the child's legitimacy thus decided, but the official solicitor objected to that course being adopted, because he said that he was not able to satisfy himself, and would be unable to satisfy the registrar, that it would be for the benefit of the infant child to move in the matter at all at the present time.

The suggestion then made on behalf of the petitioner was that by some means the question at issue between the parties ought to be determined now, because upon the determination of that question depends the further point as to how the settlement ought to be varied.

The matter arises under s. 5 of the Matrimonial Causes Act, 1859 (22 & 23 Vict. c. 61) [section read], and the Amending Act of 1878 (41 & 42 Vict. c. 19), s. 3, which extends the powers of the Court to cases where there are no children of the marriage in question.

The substantial point I have to consider is whether, by some means or other, the Court ought, in a case of this kind, to determine the question thus presented, before finally dealing with the variation of the settlement.

The objection to investigating the question of the child's

legitimacy is based upon certain decisions to which Mr. Willock referred me.

The first of those cases is *In the Matter of the Petition of Chaplin* (1), and he placed great reliance upon that case, because, he said, it was not before the Court when another case, which was relied on by the petitioner's counsel, was decided. The case of *In the Matter of the Petition of Chaplin* (1) came up for decision after the Act of 1859 but before the amending Act of 1878 was passed, and, when carefully considered, I think it will be seen to have no real bearing on the present question, because it was not an application made in the course of a divorce case. It was a case in which, a decree dissolving the marriage having been pronounced, a petition was subsequently presented for an alteration of a separation deed, and, before that came on for hearing, notice of motion was given on behalf of a brother of the petitioner, whereby he asked for an order that he might be appointed guardian of an infant for the purpose of taking proceedings on the infant's behalf under the Legitimacy Declaration Act (21 & 22 Vict. c. 93) with the object of having it declared that the infant was the legitimate child of the parties in the case. The principal argument in support of the motion was that the applicant had an interest in ascertaining whether the child was his brother's heir-at-law and next of kin, and the application, therefore, was not made for the purpose of dealing with any matter under the powers given to this Court for varying marriage settlements. The judge decided that he would refer the matter to the registrar to inquire whether the proposed suit was for the benefit of the infant. I am not sure what happened.

[*Willock* referred to *Mordaunt* v. *Mordaunt*. (2)]

But that case of *In the Matter of the Petition of Chaplin* (1) is not parallel to the present one, because it was an application, by a person who was not a party to the suit at all, to put in motion, for his own benefit, proceedings under the Legitimacy Declaration Act; and the judge, not seeing that it was for the benefit of the infant, did not accede to the application. The next case to which I was referred was *Pryor* v. *Pryor and*

(1) L. R. 1 P. & M. 328. (2) L. R. 2 P. & M. 109, at p. 118.

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Shelford. (1) In that case there was a petition by the husband for variation of settlements after decree dissolving the marriage by reason of the wife's adultery. A child had, as in the present instance, been born between the date of the decree nisi and decree absolute, and fourteen months after the respondent had eloped from the petitioner. But the Court refused to transfer to the parties settled funds free from the trusts of the settlement, and also refused to order an inquiry into the legitimacy of the child.

The judge there said that he had no objection to order that the respective interests of the parties in the settlement should be extinguished, but that he could not do more. At p. 166 of the report he puts the matter thus: "There is the interest of the infant to be considered, and I cannot assent to extinguishing the other trusts. The decree was founded on the petitioner's evidence, which is not admissible to bastardize the child. As to taking evidence of the illegitimacy, I must decline to try the question in this way." No suggestion appears to have been made in that case that the issue as to the child's legitimacy should be tried before the Court; and, reading the judgment as reported, all that one can say is that the judge declined to refer it back to the registrar to settle a question of so much importance. But he does not seem to have suggested that there was no jurisdiction in this Court to determine the question.

The next authority cited was *Douglas* v. *Douglas and Trevor* (2), where a similar question to that now before me was under consideration. In conclusion, the President (Sir F. H. Jeune) said (3): "I confess I have rather changed the view I at first entertained, although I still think that this question of legitimacy might possibly be tried upon a petition for variation of marriage settlements. I now incline to the view that the child should in this case present a petition for declaration of legitimacy, and I therefore direct the official solicitor to present such a petition on the child's behalf. The motion for variation of the settlement will stand over in the

(1) 12 P. D. 165. (2) 78 L. T. 88.

(3) 78 L. T. at p. 89.

meantime, and all questions of costs will be reserved, save only that I think the trustees of the settlement ought to have their costs out of the trust fund." I understand that a petition was afterwards presented, and I am under the impression that the result was stated to me, but there is no report of it that I am aware of. In that case it will be seen that the President thought that an issue might be directed, but he dealt with the matter by ordering that the official solicitor should present a petition for declaration of legitimacy. The case, so far as the judgment is concerned, does not deal with the means of exercising the powers under s. 5 of the Matrimonial Causes Act, 1859, and does not seem to me to go into the question on the basis of any principle. The matter was dealt with in the way indicated in the report of the case, but no reasons are given for following that or any other course, or for basing the following of the course there adopted upon any argued or considered principle.

It appears to me that this matter must be considered on principle. The section to which I have referred gives to this Court very large powers; and, in order to exercise those powers, the Court must ascertain the facts which it is necessary should be before it, so as to arrive at a decision as to what ought to be done. For instance, it is quite obvious that the Court must determine whether there is or is not any child of the marriage; and there may be various circumstances under which that question may arise for consideration. If there are no children of the marriage, the Court is not fettered by any consideration in regard to children; if there are children, then the Court must take their interests into consideration. I have said that there are various circumstances under which the question as to children may arise. Ordinarily it would arise on the point as to legitimacy; but I think it might also arise, for instance, on a point as to whether an admitted child of the marriage was, at the time when the Court was called on to exercise its powers, alive or dead. It might also arise on a point as to the maternity of a certain child—whether, in point of fact, the child was, possibly, not the child of either of the parties. It

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seems to me that, when such questions do arise, the Court must, in order to exercise its powers properly under the Acts referred to, determine that question so as to be placed in a proper position adequately to exercise its powers.

What is the position in a case of this kind? If there is no child of the marriage, the Court would have power to extinguish the interests of the respondent in the trusts of the fund brought into settlement by the petitioner; and the result, in such a case, of extinguishing the respondent's interests in that fund would be to leave the trustees, in effect, in possession of the fund in trust for the petitioner absolutely.

Then, one asks oneself, supposing the Court were to make an order simply extinguishing the respondent's life interest, what would be the position of the petitioner and what would be his rights? I think, having regard to certain decisions, that the petitioner would then be in a position to commence proceedings in the Chancery Division to obtain an order that the trustees should pay over to him the trust fund. Having the life interest, and having an absolute reversion, and nothing interposing between that life interest and that reversion, the petitioner would be in a position to give a legal discharge to the trustees, and could, as I have said, apply by a proper proceeding in the Chancery Division to enforce payment to himself of the corpus of the trust fund. The authorities for that proposition are *Burnaby* v. *Baillie* (1), where, after decree absolute dissolving the marriage, the interests to be considered were those of three children, the eldest of whom was admittedly legitimate, while the legitimacy of the two younger was disputed; and the father, under circumstances which are somewhat complicated, claimed a declaration as if there were no child of the marriage. A long discussion took place as to the legitimacy of the two younger children, and the conclusion arrived at by the judge is thus summarized (2): "Adopting the rules of law laid down in the cases to which I have referred, the evidence that the children Lancelot and Muriel are not the children of the marriage is ample and conclusive, and I must declare that the child Ruby was the only child of

(1) 42 Ch. D. 282. (2) 42 Ch. D. at p. 299.

the marriage between the plaintiff and his late wife." Then the judge (North J.) went on to consider whether he could make the declaration prayed for, that the trustees of the settlement should hand over to the plaintiff one moiety of the fund in question; but, having regard to the view he entertained, to the effect that the reservation in the deed of a power of revocation to the husband alone was invalid, the learned judge held that the plaintiff was not entitled to call on the trustees to hand over the moiety of the fund to him. But, apart from that, the case seems to be an authority for saying that, in a proper case, the Court would investigate the question as to the children and would make a proper declaration thereon.

Another case is *In re Radcliffe; Radcliffe* v. *Bewes*. (1) [Head-note read.] As I understand that decision, it amounts to this—that if the father had a life interest and also an absolute interest in reversion, and if he could get both interests vested in himself in the same capacity, he would then be in a position to obtain the transfer to himself of the whole fund absolutely.

The last decision to which I need refer is that of *Attorney-General* v. *Beech* (2), which arose under a different Act, namely, the Finance Act, 1894 (57 & 58 Vict. c. 30), s. 1, s. 2, sub-s. 1 (*b*), but seems to be based on similar principles to those of the other authorities to which I have referred. [Head-note read.] On looking at the judgments it will be seen, I think, that the reasoning, especially in the judgment of Lord Davey, is based on the consideration of whether the two interests, first a life interest and then an interest in remainder, merged so as to become one absolute ownership. Lord Davey says (3): ". . . . it is a complete fallacy, in my opinion, to say that Mr. Beech . . . . was, after he took a surrender of his mother's life interest, the owner of two separate interests. He was the absolute owner of the property, and one cannot be more than the absolute owner of the property. There is no single test of ownership that can be applied to his position at that date which shews that he was, in any degree, other than the absolute owner of the property. If he was

(1) [1892] 1 Ch. 227. (2) [1899] A. C. 53.
(3) [1899] A. C. at p. 60.

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the absolute owner of the property before Mrs. Beech's death, he remained absolute owner of the property afterwards, and there was no passing of the estate—that is, no change of ownership by reason of Mrs. Beech's death."

Applying the principles to be found in those authorities, it seems to me that if the estate of the respondent for life be eliminated, on finally dealing with the interests in this case there will be produced this state of things: the petitioner will have a life interest, and then, in default of issue of the marriage, will take an absolute interest in reversion; and, if I were to refuse to allow the Court to consider the question of the child's legitimacy, I should, in effect, be driving the petitioner into the Chancery Division to institute proceedings with the same persons as parties, and should be driving him to incur needless expense in arriving at the same conclusion as might be arrived at here. If, therefore, in the Chancery Division the question of the legitimacy of the child could be determined for the purpose of deciding finally what is to be done with the trust money, I see no reason why that same question should not be considered and determined here. It is necessary that the issue of the child's legitimacy should be determined before this Court can properly exercise its powers under the Acts dealing with variation of the marriage settlements, and it is more convenient to allow that question to be raised here, in the present proceedings, rather than in fresh proceedings in the Chancery Division.

I, therefore, accede to the present application and direct an issue to be tried here for the purpose of ascertaining and determining the child's legitimacy; and, having regard to the way in which, according to the report of *Burnaby* v. *Baillie* (1), the question was raised, the petitioner will be the plaintiff, and the trustees of the settlement, the respondent, and the child, will be the defendants. Counsel will settle the exact form in which the matter will be brought before the Court, and, in case of any difficulty in settling it, they may bring it before me in chambers. But I should think it would be raised by the plaintiff affirming and the defendants respectively

(1) 42 Ch. D. 282, at p. 287.

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denying that the plaintiff is not the father of the child born of the respondent on July 31, 1903. Of course, when I said that all the parties I mentioned would be defendants, I did not mean that the trustees or the respondent need fight the issue unless they so desire; but I think they are entitled to be represented upon it. The petitioner, being the plaintiff, will put the official solicitor, as the representative of the child, in possession of adequate means to contest the issue. That will not form part of the order now made, because I think that the practice would be that the official solicitor could apply for a stay of the trial of the issue if his costs were not provided for.

In addition to directing the issue, the latter part of the present application will also be acceded to, namely, that the making of the final order on the report upon the petition to vary the settlements be postponed until after the result of the issue has been ascertained.

Solicitors for petitioner: *Beal & Payne, for E. Bedford, Newhaven.*

Solicitors for respondent: *Young, Jackson, Beard & King.*

Solicitor for the child: *The Official Solicitor.*

H. D. G.

1904
Jan. 27, 28, 29.

THE PEARLMOOR.

Admiralty—Damage to Cargo—Bill of Lading—Exceptions—Marginal Clause —"Sweating"—"Heat"—"Decay"—Negligence of Carrier's Servants—Liability of Carrier.

In an action by indorsees of bills of lading, for damage, through negligent stowage, to a cargo of grain, part of which had become heated during the voyage, and the remainder otherwise deteriorated, the defendant shipowners relied on a series of exceptions, set out in numbered paragraphs, by which they were not to be responsible for (paragraph 2) "loss, damage, or injury arising from sweating . . . . decay . . . . explosion, heat, fire at sea or on shore . . . ."; nor for (paragraph 3) "any loss or injury to the said goods, occurring from any of the causes above mentioned or for any loss or injury arising from the perils or accidents of the seas . . . . whether any of the perils, causes, or things above mentioned or the loss or injury arising therefrom be occasioned by or from any act or omission, negligence, default, or error in judgment of . . . . stevedores . . . . or other persons in the service of the shipowners." They further relied on a marginal note, stamped on the bill of lading, under which a large quantity of maize was carried, stating that "In no case is the s.s. to be held liable for heating or any other damage accruing to the within-mentioned goods . . . . ":—

Held, by Gorell Barnes J., that the defendants were liable, for, following *Price* v. *Union Lighterage Co.*, [1904] 1 K. B. 412, a shipowner must indicate by express words his intention to relieve himself from liability for the negligence of his servants, and the exemption of negligence in the third paragraph could not be incorporated so as to refer to the matters excepted in the second paragraph or in the marginal note; and, further, that the words "sweating" and "decay" were inapplicable to cover the damage to the maize through improper stowage, whilst the collocation of the words shewed that "heat" referred to heat arising from some extraneous cause, such as heat from the engine-room.

ACTION for damage to cargo.

The plaintiffs were Robert Proctor, Sons & Co., Limited, corn merchants, of Hull. The defendants were the Moor Line, Limited, owners of the *Pearlmoor*.

The facts were shortly as follows:—

The *Pearlmoor* is a steel screw turret-deck steamer of 3480 tons gross tonnage, with five holds, Nos. 1, 2, and 3 being forward of the engines, and Nos. 4 and 5 aft. By a charter-

party, dated May 13, 1902, entered into between Runciman & Co., as owners of the *Pearlmoor*, and Taylor, Wythes & Co., shipbrokers, of Buenos Ayres, as freighters, the vessel was to proceed to Buenos Ayres and there load a full cargo of "lawful merchandise and/or grain and/or seed in bags and/or bulk as usual in the trade." Freight 10*s*. a ton on capacity of vessel to be secured by bills of lading in Taylor, Wythes & Co.'s berth form. The cargo was to be stowed by a stevedore recommended by freighters, on account of and risk of owners, the ship finding mats, dunnage, and separation cloths. By an agreement dated May 14, signed by the master on behalf of the owners, and Taylor, Wythes & Co. as freighters, the dead-weight capacity of the vessel was fixed at 5250 tons, and freight was paid on that basis.

On May 15 the vessel commenced loading her cargo at Buenos Ayres, consisting of parcels of maize, barley, and linseed (all in bags), oats (partly in bulk and partly in bags), and wheat (all in bulk), shipped under bills of lading dated May 20, 22, 24, 26, and 31, signed by Taylor, Wythes & Co. by authority of the master of the vessel as agent for the defendants, and duly indorsed to the plaintiffs, to whom the property in the cargo thereby passed.

On June 2 the *Pearlmoor* sailed from Buenos Ayres and encountered heavy weather, but not such as to cause the voyage to be unduly prolonged. On the 30th she anchored for a few hours off Madeira and took in bunker coal. On July 9 she arrived at Hull and was berthed. On the 10th she commenced to discharge cargo. On the 11th she commenced to discharge maize from No. 4 hold. On the 19th she finished discharging that hold.

By their statement of claim the plaintiffs alleged that they had suffered damage by the breach by the defendants of the contract contained in the bills of lading, in that the defendants had failed to deliver the cargo in the like good order and condition as that in which it had been received, a large quantity of the maize being rotten or greatly deteriorated from heating and contact with the metal of the ship; some of the wheat being mixed with linseed, some of the oats mixed with barley,

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and some of the wheat damaged by coal dust, the damage and mixing not being caused by any of the excepted perils.

In the alternative the plaintiffs charged the defendants with negligence in the carriage of the cargo, the negligence consisting—(*a*) in neglecting to provide sufficient dunnage; (*b*) in cutting the bags and filling the interstices between the bags with loose grain, thereby rendering the holds unfit to carry the cargo; (*c*) in not preventing the mixing of the wheat and linseed or oats and barley; (*d*) in not placing cargo battens or dunnage on the metal in the ship to keep the cargo from contact with it; (*e*) in not preventing the cutting of the bags by their stevedores or servants; (*f*) in not providing a coal-dust proof and grain-tight bulkhead between No. 3 hold and the bunkers; (*g*) in not properly cleaning the hold from coal dust.

In the further alternative the plaintiffs alleged that they had suffered the like damage by reason of the unseaworthiness of the vessel for the carriage of the cargo, the items of unseaworthiness being those enumerated in paragraphs (*a*) to (*g*).

The claim, amounting to 571*l.* 0*s.* 4*d.*, consisted of four items—namely: (*a*) loss on wheat delivered mixed with linseed, 14*l.* 17*s.* 6*d.*; (*b*) loss on oats delivered mixed with barley, 2*l.* 2*s.* 6*d.*; (*c*) loss on wheat damaged by coal dust, 2*l.* 6*s.* 4*d.*; and (*d*) loss on maize from heating and contact with metal of ship, 551*l.* 14*s.*

By their amended defence the defendants denied that there had been any breach of contract, or that they had been guilty of negligence, or that the vessel was unseaworthy. They alleged that if the maize was delivered in a damaged condition, it was due to inherent vice, and alternatively that the damaged condition and the mixing and damage by coal dust were caused by perils or causes excepted in the bills of lading. In the further alternative the defendants, while denying liability, paid 30*l.* into court as sufficient to satisfy the plaintiffs' claim.

The material exceptions and stipulations in the bills of lading were:—

1. "The act of God, the King's enemies, pirates, robbers, &c.

2. "That the master, owners, or agents of the vessel, or its connections, shall not be responsible for loss, damage, or

injury arising from sweating, insufficiency of packages in size, strength, or otherwise, bursting of packages or consequences arising therefrom . . . . decay, hook marks, or injury from hooks, stowage or contact with, or smell or evaporation from, any other goods . . . . injury to or soiling of wrappers or packages, however caused, loss of weight . . . . explosion, heat, fire at sea or on shore, at any time or in any place.

3. "That the master, owners, or agents of the vessel or its connections shall not be responsible for any loss or injury to the said goods, occurring from any of the causes above mentioned, or for any loss or injury arising from the perils or accidents of the seas, rivers, and (or) errors in navigation . . . . whether any of the perils, causes or things above mentioned, or the loss or injury arising therefrom, be occasioned by, or from any act or omission, negligence, default, or error in judgment, of the pilot, master, mariners, engineers, stevedores, or other persons in the service of the shipowners . . . . for whose acts they would otherwise be liable, or by unseaworthiness of the ship at or after the commencement of the voyage, provided all reasonable means have been taken to provide against such unseaworthiness."

The bills of lading under which the maize was carried contained the following additional stamped marginal note: "In no case is the s.s. to be held liable for heating or any other damage accruing to the within-mentioned goods, nor for insufficient strength of bagging."

The evidence of the defendants was to the effect that the linseed and wheat were carried together in No. 1 hold, and the linseed and barley (shipped as oats) in No. 5 hold; that they were properly separated on loading with separation cloths, and any mixing was due to shifting of these cloths on the voyage by reason of the heavy weather or on discharge; that mixing was not unusual as a consequence of heavy weather; that the coal-damaged wheat was placed in No. 3 hold by cutting off part of No. 2 hold with a temporary under-bulkhead which constituted the forward bulkhead in that hold; that the planks were feathered and grooved one into another; that the after-bulkhead, that is, the one separating it from the engine-room

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and thwartship bunkers, was a permanent wooden bulkhead tight and staunch with separation cloths nailed on, and if any coal dust got through it was due to the straining of the ship working the bulkhead during the voyage; that the hold was properly cleaned out after the cargo of coal which it had carried on the outward voyage; that the holds were surveyed previously to loading the cargo and certified to be dry and clean and fit to carry a perishable cargo.

The mate's receipts stated that the maize was in good order and condition, and the evidence was that the bags were stowed lengthwise along the ship, with a space of about nine inches left between the cargo and the bulkhead and fresh-water tank at the far end of the hold, and between the cargo and the bulkhead at the after end, but close up to the battens at the sides. It was admitted that the day before the loading was completed 575 bags of middlings were stowed upon the top of the maize in the forward part of No. 4 hold; but it was alleged that there was still room for upwards of fifty tons more cargo; so that the defendants contended that there was no reason for them to cut the bags in order to stow closer, and that the heating arose from inherent vice, the maize having been shipped out of condition, and containing too much moisture.

The hold was ventilated by two fifteen-inch ventilators opening out on to the main deck, one forward on the port side of the hold, and the other aft on the starboard side, and, according to the defendants' evidence, whenever possible the hatchway was opened and windsails put down into the hold; but ventilation was on several occasions prevented owing to heavy weather, particularly on June 7 and the three following days.

The plaintiffs in effect alleged that the defendants had cut large numbers of bags, thereby creating loose maize which stopped ventilation and caused heating, and their surveyors reported that all the crevices between the bags were filled with loose maize, making it one solid mass, stopping all ventilation, and causing the cargo to heat badly in the centre. The defendants admitted that a few bags of maize were damaged by sweat from touching the ceiling, but contended that there is always a considerable quantity of loose to be found in bag

cargoes owing to the accumulations on the deck being shovelled into the hold on the completion of each day's loading, that the bags were not cut but burst, and that, according to the usual mode of sorting the cargo on discharge, bags found to be burst or partly damaged are cut, and the maize shot out in order to be rebagged and classified as good, less damaged, and worst damaged.

GORELL BARNES J. It is necessary in this case to dispose first of the questions of fact, leaving the question of the construction of the bills of lading under which these goods were carried to be dealt with afterwards.

The plaintiffs are indorsees of certain bills of lading for some maize, barley, linseed, oats, and wheat shipped on the *Pearlmoor* at Buenos Ayres, for Hull, in the month of May, 1902, and it is said that the grain arrived at Hull damaged to a certain extent. The question of importance is in connection with the maize, because the claim made relating to that portion of the cargo amounts to 551*l.* 14*s.*, whereas the other matters are quite trifling. With regard to the maize, the plaintiffs' contention may be summarised in this way: That a large number of the bags were cut in order to stow more cargo into the hold; that the crevices were filled up with loose maize; and that the loose maize got into the spaces at the ends of the cargo, against the fore and after bulkheads, and also into the wings of the ship; and that, in that condition of things, the ventilation was not such as it should have been in the course of the voyage, and the damage was thus occasioned. On the other hand, the defendants' contention is that the damage was due to the state of the cargo itself—that is to say, to inherent vice, or, in other words, that its condition on shipment was such that on a voyage of this duration and character it was liable to damage by heating. Now there is some evidence which helps me to solve this question of fact. It appears that 1902 was a good crop for the purpose of shipment and carriage. There is some evidence both ways, but the general impression I have formed is that 1902 was a good crop; and, with regard to the voyage, there seems to have been

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some bad weather, when the ventilators were closed, though the master says that he had often had such bad weather before, and that there was nothing out of the usual in the weather that was experienced. He had previously said that very bad weather was experienced on June 7 and for several days afterwards, and the ventilators had to be closed sometimes for two or three days. There was undoubtedly closing of the ventilators for a certain time. The next point to notice is that the shipment was made under bills of lading which described the cargo as in good order and condition; but that does not mean anything more than that there was nothing specially noticeable about it which would require to be marked on the mate's receipts. The next question then is what was the state of things when the vessel arrived here. The surveyor, on behalf of the plaintiffs, in substance said that a quantity of bags had been cut and must have been cut in the course of the loading. Counsel for the plaintiffs contend that, apart from those classed under the head of iron damage, about 2000 bags in all must have been cut. Their witnesses say that this cutting must have been done largely abroad, and that the spaces at the ends of the hold had loose grain right up to the top of the bags, whilst the defendants' witnesses say that at the ends there was only loose stuff to the extent of two or three tiers. The plaintiffs' surveyor in his report also says that there was loose grain in the wings, making the cargo one solid mass and stopping all ventilation between the bags, and he said that he found cut bags before they were moved out of the place of stowage; that an abnormal number of bags were cut, in order to get weight and get the ship down to her trim. One of the surveyors called on behalf of the defendants admitted that 971 bags were cut; but that cutting does not affect the ventilation.

The conclusion to which I have come on a consideration of the whole of the evidence on this part of the case is that, while no doubt there is always a certain quantity of loose grain, there was in this case an unusual quantity; and I think that must have been due to the cutting of the bags at shipment, for some reason or other—it does not matter what. I think the weight of the evidence goes to shew that there was an

undue proportion of loose grain, for the reasons I have given, and that that grain was in the places where the ventilation should be—namely, in the wings, and the ends where the bulkheads should be separated from the cargo, and that there was therefore less free ventilation than there should have been. I also think that some of the bags had got against the iron structure of the ship, and wherever that occurred the ventilation would be checked, and that no doubt would affect the heating. In the result I do not think that it has been made out that the whole of this damage by heating is due to the cause which I have been considering, but I think some of it was. I think the ship's ventilation became defective to a certain extent owing to the excessive quantity of loose grain; and I have asked the Elder Brethren what is their view. They think that, as there was more loose grain due to cut bags than usual, it might aggravate the heating.

I do not attribute the whole of the heating to this cause. I think the probability is that a portion of the heating was due to the tender state of such a cargo, and to its being confined in the hold of the ship—that is to say, I think that both causes contributed to the heating, and that I must make a rough estimate in endeavouring to find to what extent this cargo has been affected by improper treatment on board the ship. It appears to me that the proper and only conclusion I can come to is to put down half of the heating to that cause. If the damage by heating amounts to 400*l.*, I think 200*l.* of that is due to the choking up of the ventilation.

The next matter to discuss is what has been called the iron damage. It does not seem to me to be quite the right term. It means the damage to the bags which have been against the ironwork of the ship, and which, in consequence of the accumulation of water, have been thereby damaged. The bags were described as being so wet that they burst when moved, and the grain poured out and was damaged. Now, the quantity that is said to have met with damage in this respect is 920 bags in all, equivalent to 344 quarters, and it is said that the damage amounts to 81*l.* Was that due to bad

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stowage? I understand the contention of the defendants to be that it was due to the working of the ship in bad weather if any bags got out of place—that everything was right at the start, and that any cargo which got against the side of the ship got there in the course of the voyage. Here again there is a question of fact to decide. The broad contention of the plaintiffs is that some of the cargo battens were not in their places when the ship arrived, so that some of the cargo got against the sides and frames and stringers—in other words, that the iron of the ship was not adequately protected. On the other hand, the case for the defendants is that the battens were all in their places when the ship started. I think that the evidence for the plaintiffs is better than that for the defendants on this point. My opinion is that the places where this grain had got against the ironwork of the ship were not adequately protected, in the way they should have been, when the ship started. I accept, broadly speaking, the view presented on this part of the case by the plaintiffs, and I find that the damage was due to improper stowage. So that matter will depend, as also the point I have already decided, upon what effect is to be given to the bills of lading. With regard to the other small items, wheat and coal dust got mixed, and it seems to me that could not have happened without there being some defect in the bulkhead. So also with regard to the mixing of wheat and linseed. It was a temporary bulkhead, and seems to have been in such a condition that the grain got through the interstices. Lastly, there was an item for the mixing of barley and oats in No. 5 hold. I cannot see how that can have happened unless the separation cloths were not properly placed. Those are my findings on this matter, and the next question is what is the law.

Pickford, K.C., *Alexander D. Bateson*, and *H. Stuart-Moore*, for the plaintiffs. The damage to the cargo was due to the negligence of the servants of the shipowner, and the exceptions will not cover that negligence. The law on this point is tersely expressed in the considered judgment of Walton J.

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in *Price* v. *Union Lighterage Co.* (1), where, after referring to the leading cases dealing with the question, he says: "If the carrier desires to relieve himself from the duty of using by himself and his servants reasonable skill and care in the carriage of goods, he must do so in plain language, and not by general words." Here the marginal note in the bills of lading for the carriage of the maize uses the words "In no case," but does not specifically except negligence; and, therefore, the same principle applies, and the shipowner cannot escape liability.

[GORELL BARNES J. In *Taubman* v. *Pacific Steam Navigation Co.* (2) there was a condition in the contract with the plaintiff passenger that the defendants would not be answerable for loss of or damage to his luggage "under any circumstances whatsoever," and this stipulation was held to cover wilful default and misfeasance by the shipowner's servants.]

That was a special contract between the shipowner and the passenger. It was not part of a bill of lading, and may have to be reconsidered when a similar point arises. With regard to the expression "sweating" in the second paragraph of the exceptions, it is submitted that the evidence does not suggest moisture dropping on to the bags from condensation, which is what is implied in that word, and, therefore, the damage cannot be brought under that head, nor can the negligence clause be made to apply to any of the matters in the second paragraph, and the collocation of the words "explosion, heat, fire at sea or on shore" in the same paragraph suggests "heat" from some extraneous cause, and not from "heating" of the cargo itself by want of ventilation due to bad stowage.

[Reference was made to *Mitchell* v. *Lancashire and Yorkshire Railway* (3); *Ashendon* v. *London, Brighton and South Coast Railway.* (4)]

Laing, K.C., and *Adair Roche*, for the defendants, the owners of the *Pearlmoor*. The words "damage . . . . arising

(1) [1903] 1 K. B. 750, at p. 754; affirmed [1904] 1 K. B. 412.
(2) (1872) 1 Asp. M. L. C. 336.
(3) (1875) L. R. 10 Q. B. 256.
(4) (1880) 5 Ex. D. 190.

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from sweating" in paragraph 2 of the exceptions cover the damage sustained, for the moisture given off as the result of the heating of the cargo is, until condensed, "sweat," and the word "decay" will also apply. The word "heat" is used in a general sense, and covers the damage to the maize, for it is followed by the words "fire at sea or on shore at any time or in any place." It is submitted also that the words of the marginal note, "In no case is the steamship to be held liable for heating or any other damage," include negligence, and relieve the defendant shipowners from all liability. This is a rubber-stamp clause expressly inserted in bills of lading for maize and similar cargoes which are particularly liable to damage by heating. If there had been room this marginal note would have been stamped as part of paragraph 3; but the position is not material, for, even if it does not by itself include negligence, the construction cannot be so limited as to read each paragraph by itself, and the words "causes above mentioned" in paragraph 3 clearly refer to paragraph 2; so that when the whole of the exceptions and stipulations are taken together the result is that, assuming negligence in the servants of the shipowner, that negligence is covered, and in paragraph 3 the negligence of stevedores is expressly excepted.

[Reference was made to *Phillips* v. *Clark*. (1)]

Pickford, K.C., in reply. The marginal note cannot be read otherwise than where it is, and not, as suggested by counsel for the defendants, where it ought to be, for the exceptions to the shipowner's liability must, where the words leave the intention in doubt, be construed against him as the person for whose benefit they have been introduced—that is to say, their meaning cannot be extended to give the shipowner a protection for which he has not in clear terms bargained, with the result that, in this case, the defendants are liable for the negligence of their servants engaged in performing the contract, as the general words relied on by counsel for the defendants excepting damage from particular causes do not help the shipowner, the cause having come into operation through the negligence of his servants.

(1) (1857) 2 C. B. (N.S.) 156.

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GORELL BARNES J. Having disposed of the questions of fact, I now have to apply the law, and for this purpose I must proceed to consider the terms of these somewhat extraordinary bills of lading. They are all in the same form, but the marginal clauses are stamped only on the bills of lading relating to the maize. They contain very long clauses of exceptions, and if it had not been for the courtesy of counsel in providing me with a typewritten copy, I do not know how I should have been able to read these exceptions without the assistance of a magnifying glass, as they are contained in several paragraphs of very small print. I cannot understand why at the present day shipowners do not take the opposite course to that which these bills of lading take—of excepting a mass of detailed perils, causes, and things—and state what they are willing to be responsible for. However, the exceptions seem to grow and grow, based upon the old form of bill of lading.

The first point that is taken is a general point, and that is that what I may term the negligence clause—the third clause of exceptions—does not apply to those exceptions which have been relied upon by the defendants. The third clause begins thus: "That the master, owners, or agents of the vessel or its connections shall not be responsible for any loss or injury to the said goods, occurring from any of the causes above mentioned." I suppose "the causes above mentioned" must there mean the causes referred to in the first and second paragraphs of the exceptions and stipulations, because those are the only causes that so far have been above mentioned; but then comes a long string of words, commencing thus: "or for any loss or injury arising from the perils or accidents of the seas," &c. This ends with the words, "whether any of the perils, causes, or things above mentioned, or the loss or injury arising therefrom be occasioned by or from any act or omission, negligence, default, or error in judgment of the pilot, master, mariners, engineers, stevedores, or other persons in the service of the shipowners, whether on board the said ship or any other ship belonging to or chartered by them, or otherwise howsoever for whose acts they would otherwise be liable."

Now it is quite clear that the words "above mentioned"

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which I have just read cannot have precisely the same meaning as the words "above mentioned" at the beginning of paragraph 3; because the first part only refers to the first and second sets of exceptions, and if it only refers to the first and second sets of exceptions, to use the words "above mentioned" where they occur again in precisely the same way would then only refer to the first and second sets of exceptions. The contention by counsel on behalf of the plaintiffs is that where you find the words "above mentioned" a second time they refer to what is just above—namely, in the third paragraph, beginning with the words "or for any loss or injury arising from the perils." The contention on behalf of the defendants is that they must include those perils, causes, or things, and also the causes or things mentioned in Nos. 1 and 2. I have considered this matter with some care, and the view that I take is that when the words "above mentioned" are used a second time, having regard to their collocation, they only refer to the specific causes and things which are set out in paragraph 3. It may be doubtful whether I am right in taking that view; but that is the construction which I hold to be correct.

If that is the right construction it makes an end of this case; but, assuming that is not the view to take, I have still to consider the effect of the words in paragraph 2, on which the defendants rely. What are those words? They rely first on the word "heat." I think that the contention of the plaintiffs is correct, and that that word, having regard to its collocation —between the words "explosion" and "fire at sea or on shore"—does not refer to the heating of the cargo from its own spontaneous combustion or generation of heat, through the action of moisture coming against it, or its own moisture causing it to develop heat, but that the word "heat" refers to some extraneous source, such as heat coming from the engine-room. The next word relied upon is the word "decay." The argument upon that was very faintly pressed, and I do not think that any of the loss, with which I have had to deal when coming to a decision on the facts, can be attributed to the ordinary meaning which is attached to the word "decay."

Then comes the word "sweating"—"loss, damage, or injury arising from sweating." Now, I have already found that the damage was due to the causes which I specified in my judgment upon the facts, and it seems to me that those causes do not include the idea of sweating. I think the correct view of that word is that expressed by counsel for the plaintiffs—namely, of moisture dropping on to the bags from condensation, which arises if there is moisture which evaporates and then condenses in the hold. The damage, in my opinion, was not caused by that class of injury.

There is a further point taken on the marginal clause, which is as follows: "In no case is the steamship to be held liable for heating or any other damage accruing to the within-mentioned goods, nor for insufficient strength of bagging." Now, several cases have been referred to in connection with this point, particularly *Price* v. *Union Lighterage Co.* (1) I only propose to refer to one paragraph in the judgment of Walton J., which summarises what I wish to say upon this matter. It is as follows: "I understand the meaning of this to be that an exemption in general words, not expressly relating to negligence, even though the words are wide enough to include loss by the negligence or default of the carrier's servants, must be construed as limiting the liability of the carrier as assurer, and not as relieving him from the duty of exercising reasonable skill and care. If the carrier desires to relieve himself from the duty of using by himself and his servants reasonable skill and care in the carriage of goods, he must do so in plain language and explicitly, and not by general words." The words in this case are general, not expressly referring to negligence, and it seems to me do not include negligence on the part of the shipowner or those for whom he is responsible. The view which I take about this clause is fortified by the fact that the marginal clause only occurs in a bill of lading which deals with negligence in certain specific cases; and negligence being thus dealt with in certain specific cases leads to the conclusion that —general words being used elsewhere—if in such a marginal clause as this the negligence of the shipowner or his servants

(1) [1903] 1 K. B. 750, at p. 754; [1904] 1 K. B. 412.

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is to be excluded, the language should expressly refer to that exclusion.

There is a further point to be considered, namely, that what has been called in the course of this case the iron damage is, as the defendants contend, sweating damage. If the first point that I dealt with, as to the construction of the words in clause 3, so far as they affect clause 2, is right, then any difficulty as to the construction of the word "sweating" is disposed of; but even if the view I take is not correct, it appears to me, having regard to the facts, that it is not shewn by the defendants that the damage I have dealt with is, strictly speaking, damage done by sweating. There are only some other small matters to refer to—namely, the damage to the wheat and linseed and the barley and oats by mixing. It was not contended that those small items could be really brought within any of the terms of the exceptions in the bill of lading, and, therefore, the defence as to them fails. The result, in my opinion, is that the 30*l.* which has been paid into court in this case is not sufficient to satisfy the plaintiffs' claim, assuming that the damage which I have found, but which will have to be definitely ascertained by the registrar and merchants, exceeds that amount, which it almost certainly will do. I must, therefore, decide in favour of the plaintiffs, for an amount to be ascertained by the registrar and merchants in accordance with my judgment.

Solicitors for plaintiffs: *Pritchard & Sons, for Andrew M. Jackson & Co., Hull.*

Solicitors for defendants: *Botterell & Roche.*

T. L. M.

[IN THE COURT OF APPEAL.]

C. A.
1904
April 27;
May 4.

In the Goods of ELIZABETH PRYSE, Deceased.

Probate — Practice — Universal Devisee and Legatee — No Executor named — Administration or Probate — Title of Administrator to Real Estate — Land Transfer Act, 1897 (60 & 61 *Vict. c.* 65), *s.* 1, *sub-s.* 1; *s.* 24, *sub-s.* 2.

The universal devisee and legatee of a testamentary paper in which no executor is named, is entitled to administration with the will annexed, but not to probate according to the tenor of the will. The practice of the Probate Court hitherto prevailing in this respect has not been altered by the Land Transfer Act, 1897.

Per Stirling L.J.: The title of an administrator, though it does not exist until the grant of administration, relates back to the time of the death both as to real estate (by virtue of s. 1, sub-s. 1) as well as to personalty.

Appeal from an order of Sir F. P. Jeune P. of March 7, 1904, refusing to order a grant of probate to Sophia Evans as executor according to the tenor of the will of the above-named Elizabeth Pryse.

Elizabeth Pryse, who died in January, 1903, by her will of August 16, 1901, left all her property whatsoever to her daughter Sophia, and directed her said daughter to pay a mortgage debt of 60*l.* due upon her freehold property, and further directed that in consideration of her doing so the whole of her said freehold property should go to the daughter absolutely. No executor was appointed by the said will, and no other beneficiaries were named other than the testatrix's said daughter Sophia, now the wife of William Evans.

The daughter applied for a grant of probate of the will to her as executrix according to the tenor thereof. The registrar declined to allow probate to issue, being of opinion that Sophia Evans was not the executrix according to the tenor on the construction of the will. Sophia Evans then applied to the President to decree probate of the will to her according to the tenor thereof. The President on March 7, 1904, refused her application.

Sophia Evans appealed.

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Griffith Jones, for the appellant. The daughter as universal devisee and legatee is entitled to a grant of probate of the will according to the tenor thereof; she is in effect constituted universal heir by the will, and in *Androvin* v. *Poilblanc* (1) Lord Hardwicke said a person named "universal heir" in a will would have a right to go to the Ecclesiastical Court for the probate. The practice of the Court undoubtedly has been to grant administration with the will annexed to the person beneficially entitled as universal legatee; but if on considering the principle of such grant the Court should be of opinion that the practice was wrong, it will not be bound by it. *Androvin* v. *Poilblanc* (1) was distinguished in *In the Goods of Oliphant* (2), where the antiquity of the old practice was recognised; but that decision does not lay it down that it may not be right to grant probate in certain cases, though there the universal legatee had to take administration with the will annexed. In the present case the daughter is universal devisee or universal heir, and probate ought to be granted to her as in *Androvin* v. *Poilblanc*. (1) The Land Transfer Act, 1897, has made a great difference in the position of a devisee. The question in whom the real estate vests since 1897 in cases of testacy or intestacy in the interval between the death of the deceased and the issue of a grant of representation is doubtful; in Tristram and Coote's Probate Practice, 13th ed. p. 8, it is stated that on the whole it may fairly be conjectured that as the Land Transfer Act, 1897, has made no provision on the subject, the real estate vests in the heir-at-law. As letters of administration operate only from the grant, there would be an interval between the death of the testatrix and the grant, during which trespass might be committed on the real estate, and the administrator would be powerless to stop it; the title of an executor is different from that of an administrator, as it relates back to the death.

[COZENS-HARDY L.J. Sect. 1, sub-s. 1, of the Land Transfer Act, 1897, provides that the real estate is to become vested in the personal representative as if it were a chattel real, and by s. 24, sub-s. 2, the expression "personal representative" means executor or administrator.]

(1) (1745) 3 Atk. 298, 300.

(2) (1860) 1 Sw. & Tr. 525.

The Act cannot vest real estate in a person who is not in existence at the time of the death; the administrator does not exist until letters of administration are granted. As to personal estate, that is vested, until the grant of letters of administration, in the President of the Probate Division; but the difficulty as to real estate still remains. Pending the grant of letters of administration, the heir-at-law might take possession, and there would be no one entitled to bring ejectment. No one can be injured by the grant of probate according to the tenor of the will instead of letters of administration with the will annexed; and, having regard to the alteration in the law by the Land Transfer Act, 1897, as to the devolution of real estate on death, it is submitted that the old practice ought no longer to be followed in the case of an universal devisee.

[VAUGHAN WILLIAMS L.J. We will mention the matter to the judges of the Probate Division before we give judgment.]

May 4. VAUGHAN WILLIAMS L.J. In this case we postponed our decision in order that we might consult the judges of the Probate Division and ascertain what circumstances govern the practice of that Division of the Court. Now it is admitted, quite irrespective of those inquiries, that for a very large number of years—one hundred years or more—the practice of the Probate Court in cases where some one is not named as executor in a will and no duties are indicated in the will that would constitute him executor thereof according to the tenor, but who has such an interest that, in spite of not being named as executor, he might be looked to to act as such, has been, not to grant probate, but to grant letters of administration with the will annexed. That being admitted to have been for a long time the practice, it was suggested that it had been recognised in *In re Oliphant* (1) that the practice might be departed from in certain cases; and it was further suggested that by reason of the law having been modified by the Land Transfer Act, 1897, in respect of the devolution of land on death, there was a reason why the prevailing practice should not be followed, and that the practice which was suggested in *Androvin* v.

(1) 1 Sw. & Tr. 525.

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Vaughan Williams L.J.

Poilblanc (1), referred to in the case of *In re Oliphant* (2), should be either substituted for it, or substituted for it at the discretion of the Court. Now, in the first place, I have come to the conclusion that, so far as the rights and interests of the applicants here are concerned, it does not make the slightest difference whether that which is granted is probate according to the tenor of the will or letters of administration with the will annexed. It was suggested that if all that was granted was letters of administration with the will annexed, it might be that some trespasses might be committed on the land, and that, if that was done, substantially there would be no remedy. I cannot agree there. So far as the remedy in the shape of an action of trespass is concerned, there can be no doubt that now, as indeed always has been the case, as is evidenced by the decision in *Rex* v. *Inhabitants of Horsley* (3), a person getting letters of administration was entitled to bring an action for the trespasses committed in the interval, and was entitled to do that, notwithstanding the fact that there is not the same relation in the case of letters of administration that there is in the case of title under probate. Then it was suggested that there might be some difficulty because the most appropriate remedy might be some remedy which should prevent a wrong being done at the moment when it was being committed. But there again the remedy is quite sufficient. If necessary, there could be no sort of difficulty in obtaining a receiver.

Under these circumstances, the first conclusion I come to is that there is no real interest of the applicant which is in the slightest degree taken from her by the fact that that which was granted was letters of administration with the will annexed as distinguished from probate.

Then upon the question of what the present practice is, the President of the Probate Division has informed me that the practice is still that which has been in force for so very many years, and he has further informed me that to alter the practice would make considerable trouble and confusion in the office.

Under those circumstances, it seems to me that this appeal fails altogether.

(1) 3 Atk. 298, 303. (2) 1 Sw. & Tr. 525.
(3) (1807) 8 East, 405.

STIRLING L.J. I am of the same opinion, and for the same reasons. It is laid down in the case of *Foster* v. *Bates* (1) that "It is clear that the title of an administrator, though it does not exist until the grant of administration, relates back to the time of the death of the intestate; and that he may recover against a wrong-doer who has seized or converted the goods of the intestate after his death in an action of trespass or trover. All the authorities on this subject were considered by the Court of Common Pleas in the case of *Tharpe* v. *Stallwood* (2), where an action of trespass was held to be maintainable. The reason for this relation given by Rolle C.J., in *Long* v. *Hebb* (3), is that otherwise there would be no remedy for the wrong done." That law is stated with reference to an action of trespass or trover with regard to goods; but in the case of *Rex* v. *Inhabitants of Horsley* (4) Lord Ellenborough treats the same law as being applicable to the case of leasehold property. Now that being so, and regard being had to the terms in which the Land Transfer Act of 1897, s. 1, sub-s. 1, is expressed, namely, "Where real estate is vested in any person, without a right in any other person to take by survivorship, it shall on his death, notwithstanding any testamentary disposition, devolve to and become vested in his personal representatives or representative from time to time as if it were a chattel real"—a term which includes a leasehold—"vesting in them or him," I think the substantial ground on which this appeal is based fails, and that the practice of the Probate Court ought not, after having been so long established, to be altered now.

COZENS-HARDY L.J. I agree.

Appeal dismissed.

Solicitors: *A. J. Hughes & Hughes.*

(1) (1843) 12 M. & W. 226, at p. 233; 67 R. R. 311, 317.
(2) (1843) 12 L. J. (N.S.) (C.P.) 241; 5 Man. & G. 760; 63 R. R. 474.
(3) (1652) Sty. 341.
(4) 8 East, 405.

W. C. D.

C. A.
1904
June 8.

[IN THE COURT OF APPEAL.]

CONSTANTINIDI *v.* CONSTANTINIDI AND LANCE.

Divorce—Practice—Variation of Settlements—Answer to Petition before Decree Absolute—Lis Pendens—Matrimonial Causes Act, 1859 (22 & 23 *Vict. c.* 61), *s.* 5.

A petitioner who has obtained a decree nisi for dissolution of marriage cannot proceed with a petition to vary settlements until the decree has been made absolute; and nothing done between the time when the decree is made absolute and the hearing of the petition to vary can affect the power of the Court to vary the settlements.

APPEAL from a decision of Gorell Barnes J. giving the respondent one month's time to file her answer to a petition for variation of settlements from May 14, 1904, the date of his order.

On August 10, 1903, a decree nisi for dissolution of marriage was pronounced on the husband's petition. This decree had not been made absolute. The respondent and co-respondent gave notice of appeal, but their appeals were abandoned. There was no issue of the marriage.

On March 11, 1904, the husband presented a petition for the variation of the settlements made on his marriage with the respondent. There were two settlements.

By the respondent's settlement dated October 23, 1889, funds were settled upon trust to pay the income of certain funds to her for life, but during the then intended coverture without power of anticipation; after her death upon trust as to capital and income for her children by the petitioner or any after-taken husband as she should appoint; in default of children upon trust to pay the income to any surviving husband during his life; and subject thereto upon trust as to capital and income for the respondent's father.

By the petitioner's settlement dated February 1, 1890, funds were settled upon trust to pay the income to the respondent for life without power of anticipation during any coverture, and subject thereto to the petitioner during his life; trusts

were declared in favour of the children of the marriage, and in default of children for the petitioner's next of kin.

The respondent took out a summons asking for two months' time to file her answer to the petition for variation of the settlements from the date of the decree absolute to be made in the suit. On May 10, 1904, the registrar made an order that she should have one month's time from the date of the decree absolute.

The petitioner applied to Gorell Barnes J. to rescind the registrar's order, and the learned judge varied the order by directing that the time for delivering the answer should be one month from May 14, 1904, the date of his order.

The respondent appealed, and asked for one month from the date of the decree absolute.

Bargrave Deane, *K.C.*, and *Barnard*, for the respondent. The Court has no power to entertain a petition by a successful petitioner to vary settlements before the decree is made absolute. The petitioner's object in taking this course is to postpone his application to have the decree made absolute, and thus to prevent the appellant from marrying the co-respondent. By s. 5 of the Matrimonial Causes Act, 1859 (1), and rule 95 of the Divorce Rules, 1865, power is given to the Court to vary settlements. That jurisdiction only arises after "a final decree." It is said that if the respondent marries again rights may be acquired which will exclude the jurisdiction of the Court. But it is submitted that nothing done after the decree is made absolute can oust the power of the Court to deal with the property comprised in the settlement.

There can be no assignment pendente lite. Gorell Barnes J. decided this case upon s. 45 of the Matrimonial Causes Act, 1857, and s. 6 of the Matrimonial Causes Act, 1860; and held,

(1) Sect. 5 of the Matrimonial Causes Act, 1859: "The Court after a final decree of nullity of marriage or dissolution of marriage may inquire into the existence of ante-nuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree, and may make such orders with reference to the application of the whole or a portion of the property settled either for the benefit of the children of the marriage or of their respective parents as to the Court shall seem fit."

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following *Midwinter* v. *Midwinter* (1), which was a decision on those sections, that there could be an inquiry before decree absolute. But that is quite a different enactment. It relates to the power of the Court to order a guilty wife to make a settlement and has nothing to do with variation of settlements. In *Midwinter* v. *Midwinter* (1) it was pointed out that the Court could hold an inquiry before decree absolute, because the order could be made under s. 6 of the Act of 1860 "at the time of" the final decree. *Stanhope* v. *Stanhope* (2) was referred to, but that was only a question of revivor. *Wigney* v. *Wigney* (3) decided that there was no lis pendens as to the settlements until the final decree had been made. That shews that this petition to vary has been presented prematurely.

[VAUGHAN WILLIAMS L.J. It makes no practical difference. The petition is there, and ready to take effect the moment the decree is made absolute.]

The petition must be presented as soon as the Act allows, but it ought not to be presented before that time.

Lawson Walton, K.C., Priestley, K.C., and *W. B. Pike*, for the petitioner. It is not contended that as a general rule the Court will entertain an inquiry, to which by s. 5 of the Act of 1859 a decree absolute is a condition precedent, before that decree is made. But in this case, if the decree is made absolute before the settlements are varied, the respondent will gain an advantage over the petitioner. If she marries the co-respondent immediately after the decree is made absolute, it will be said that the restraint on anticipation has arisen again under the husband's settlement and that the second husband has acquired an interest under the respondent's settlement, and that the Court has no power to interfere with these interests. She may deal with some of the property, and the Court cannot take away the interest of a purchaser for value: *Wigney* v. *Wigney*. (4)

[VAUGHAN WILLIAMS L.J. The marriage of the respondent with the co-respondent after there is a lis pendens cannot have any effect on the powers of the Court. Nothing which

(1) [1892] P. 28.
(2) (1886) 11 P. D. 103.
(3) (1882) 7 P. D. 228, 232.
(4) 7 P. D. 228.

intervenes between the decree absolute and the petition to vary can have that effect. You can leave the petition on the file, and request the Court to consider it at the right time.

ROMER L.J. There is no advantage to you in getting the respondent's answer now. It is possible the decree may never be made absolute. But you can leave this petition on the file, and the Court will take notice of it the moment the decree is made absolute.]

The difficulty is caused by the judgment of Lindley L.J. in *Michell* v. *Michell*. (1) The Court will have no jurisdiction if the respondent marries again.

[VAUGHAN WILLIAMS L.J. There cannot be a second marriage until the decree has been made absolute; and the petition to vary will be a lis pendens before the second marriage can be celebrated.

ROMER L.J. Giving the respondent a month from the date of the decree absolute cannot hurt the petitioner. The registrar was right.

COZENS-HARDY L.J. It is like cases of rectification of settlements. An assignment by a beneficiary before action brought is good; but the moment the writ is issued the doctrine of lis pendens applies.]

The petitioner is quite satisfied with that expression of the opinion of the Court.

VAUGHAN WILLIAMS L.J. Then the appeal will be allowed.

Appeal allowed.

Solicitors: *Lewis & Lewis; Hollams, Son, Coward & Hawksley.*

(1) [1891] P. 208, 210.

H. C. R.

1904
June 9.

THE CAYO BONITO.

Admiralty—Salvage—Launchers of Lifeboats.

When a lifeboat, belonging to the National Lifeboat Institution, is launched for the purpose of saving life, the crew of the lifeboat, and the launchers, look to the institution for payment according to the scale provided by the rules; but if, on arriving at the vessel in danger, the services of the crew of the lifeboat are engaged to endeavour to save the vessel, then, as the crew of the lifeboat becomes, under the rules, a party of salvors who have borrowed the lifeboat for property salvage purposes, and who look to the owners of the property for their remuneration, the launchers will also be entitled to look to the owners of the property for salvage in respect of the services which their efforts enabled the crew of the lifeboat to render.

CONSOLIDATED ACTIONS OF SALVAGE.

The plaintiffs in the first action were the coxswains and crews of the lifeboats *Robert and Mary Ellis* and *Upgang*, belonging to the Royal National Lifeboat Institution; and, in the second action, Thomas Day Cass on behalf of himself and ninety-eight other launchers of the lifeboats.

The defendants were the Cuban Steamship Company, Limited, owners of the *Cayo Bonito*.

The case is reported on the question of the right of launchers of lifeboats (1) to property salvage on the ground of constructive assistance.

(1) The following are the "Salvage Regulations" issued by the Lifeboat Institution:—

"The Royal National Lifeboat Institution is a charitable institution, incorporated by Royal Charter, for the purpose of saving life from shipwreck.

"As however a rigid adherence to the precise object of the institution would lead to the loss of much valuable property, and at the same time be unjust to the lifeboats' crews, composed for the most part of men whose calling is to render property salvage services, the institution permits the lifeboats' crews to use its boats for such services under the following regulations:—

"1st. The lifeboat is never to be launched for any purpose other than for saving life, without the direct sanction of the honorary secretary, or of some other authority connected with the local committee, and on no account to be used for other purposes, to the injury of private interests.

"2nd. When a lifeboat has been launched for the purpose of saving life, and it is found on arriving at the vessel in danger that the master, or

The lifeboat *Robert and Mary Ellis* carries a crew of thirteen hands, is of the value of 800*l.*, and is stationed at Whitby.

other responsible person in charge, wishes to engage the services of the lifeboat's crew to endeavour to save the vessel, the lifeboat's crew are at liberty to accept an engagement with such master, or other responsible person in charge, for this purpose, and to make use of the lifeboat under the following conditions:—

"A. That all reasonable care be taken of the lifeboat and its gear.

"B. That it be clearly understood that the position of the lifeboat's crew towards the institution is changed from a lifeboat crew endeavouring to save life, and entitled to be paid for such endeavours by the institution, to a party of salvors who have borrowed the lifeboat for property salvage purposes, for the remuneration of which services they are to look to the person in charge of the vessel who has engaged them. Should the boat be damaged while rendering such services the cost of repair to be met by the salvors.

"C. Should the attempts of the lifeboat's crew to salve the vessel be successful, but the amount of salvage money paid them be less than the amount the crew, helpers, &c., would have been entitled to for an endeavour to save life, the difference will be made good by the institution. Should, however, they be unsuccessful in salving the vessel, they will be paid by the institution as though they had launched for the purpose of saving life.

"3rd. If the lifeboat be launched for the purpose of saving life, and it be found on reaching the vessel that there is any immediate probability of efforts to float her, or to place her out of danger, meeting with success, and the lifeboat's crew be not required to salve property, but merely to remain at hand in case it should be found necessary to desert the vessel, it shall be permissible for the boat to remain if the coxswain deem it practicable, but this service will be regarded as a life-saving service to be paid for by the institution, and not a property salvage service to be remunerated by the vessel.

"It must be clearly understood, however, that this regulation relates to *immediate efforts* only, which may be considered to extend to one hour after the high water immediately following the launching of the lifeboat. Any claim for extra payment from the institution for this special service must be accompanied by a letter or certificate from the master, or other responsible person in charge of the vessel, setting forth that the service was rendered at his request and the time it occupied.

"The attendance of the lifeboat and its crew during any lengthened operations at the request of the master, or other responsible person in charge of the vessel, whether assistance is given in such operations or not, will be considered a property salvage service, and will not be paid for by the institution.

"4th. The lifeboats' crews are *strictly* prohibited from making any claim on a vessel for *life salvage*, as such services are paid for by the institution."

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The lifeboat *Upgang* carries a crew of fourteen hands, is also of the value of 800*l.*, and is stationed at Upgang, a mile and a half to the north of Whitby.

On January 21, 1904, about 9.30 P.M., the coxswain of the *Robert and Mary Ellis* was warned by one of his crew that a steamer had just gone ashore on the Upgang rocks. The crew of the boat were at once mustered and the lifeboat launched through a heavy surf by some eighty launchers. In about an hour the lifeboat reached the vessel, which proved to be the *Cayo Bonito*, a screw steamship of 3427 tons gross register, and thirty-two hands, with engines of 1800 horse power effective, and of the value of 34,000*l.* She was on a voyage from South Shields to Galveston in water ballast, with about 250 tons of ballast on deck and 50 tons in her holds. She had stranded owing to the pilot mistaking the Whitby pier lights for the lights of fishing vessels, and was heading to the southward, the wind being from the N.W. with some sea, and the tide about four hours' ebb.

According to the evidence of the plaintiffs an anchor weighing 18 cwt. was with difficulty passed to the lifeboat, and after having been taken away to the N.E. it was lowered with 120 fathoms of wire hawser attached. The Upgang lifeboat now came up, and a second anchor having been made fast to her bows, 125 fathoms of manila warp were coiled in her, and she was towed away by the *Robert and Mary Ellis* to the N.E. by N., where the anchor was dropped. In the meantime the ballast tanks had been run out, and, some of the slag ballast having been jettisoned, about 2.30 A.M. on the 22nd the steamer's engines were moved astern whilst the winches were hove upon, with the result that the steamer gradually came clear, and subsequently proceeded to Newcastle, having sustained considerable damage.

The plaintiffs in the second action, who were some of the launchers on the occasion in question, by their statement of claim alleged that they were "members of a body of fishermen and boatmen at Whitby who man and launch the lifeboats *Robert and Mary Ellis* and *Upgang*. Those who arrive first when summoned man the boats, with two regular coxswains

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and a regular bowman to each boat, and the requisite number of the remainder launch the lifeboats; but those who go and those who stay to launch alike share in the salvage service and reward." When the alarm was given that a ship was in distress, forty-one of the plaintiffs proceeded to launch the *Robert and Mary Ellis*. The night was cold and foggy. The tide had ebbed considerably, and the hauling of the boat down to the sea was long and heavy and had to be done without horses. Whilst some of the men carried away ropes to the pier-head, others had to go deep into the water to get the boat off the carriage, and ran great risk of having the boat washed on the top of them, and one of their number had a narrow escape from being crushed and drowned. The difficulties attending the launching of the *Upgang* by the remainder of the plaintiffs were similar in character, but lasted longer as she took nearly two hours to get away owing to her being several times washed back to the shore.

By their statement of defence to the first action the defendants admitted that the crews of the lifeboats were engaged by the master of the *Cayo Bonito* to lay out the anchors; but they alleged that this was a matter of precaution only, as the vessel came off on the flood tide by the use of her own engines, and they brought 250*l.* into court as sufficient to satisfy the claim of these plaintiffs.

By their defence to the second action the defendants denied that the launchers rendered any salvage services to the *Cayo Bonito*, and alleged that the "lifeboats were the property of the Royal National Lifeboat Institution, and were launched in accordance with the regulations of that institution for the purpose of saving life and not otherwise, and the said lifeboats and their crews were not and could not be under the said regulations engaged in performing any services to property before their arrival at the *Cayo Bonito*." In the alternative they alleged that the plaintiffs "in launching the lifeboats were employed and entitled to be paid for their services by the said institution and not otherwise." In the further alternative they alleged that the plaintiffs in launching the lifeboats were employed by the plaintiffs in the first action.

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Laing, K.C., and *Lauriston Batten*, for the plaintiffs, the coxswains and crews of the lifeboats. The tender is inadequate, for the *Cayo Bonito* was saved from a position of great danger by the local knowledge and skilful and prompt salvage services rendered by the crews of the two lifeboats. It was a bad time of the year. The vessel was aground on a rocky coast and the laying out of the anchors prevented her swinging further in, when she must have been holed and become a total wreck. The boats being engaged in the salvage of property they were at the risk of the plaintiffs, who have become liable for repairs and for the payment to the launchers of the customary 10*s.* per man.

Adair Roche, for the plaintiff launchers. The service rendered by the plaintiffs in launching the two lifeboats was laborious and dangerous. It was an essential preliminary to the subsequent services of the crews of the boats, as but for the assistance of the plaintiffs the boats could not have been launched. It was, therefore, by the joint efforts of the launchers and the crews of the lifeboats that the salved vessel was rescued from a very perilous position, and on this ground the plaintiff launchers are entitled to claim against the defendants, the owners of the *Cayo Bonito*.

Apart from the coxswain and bowman, the crew of a lifeboat consists of those who arrive first; so that any one of the plaintiffs might be a member of the crew on the next occasion, and then again one of the launchers. The amount paid to a launcher by the institution when the lifeboat is launched for the purpose of saving life is about one-fifth of the sum paid to each member of the crew. In the case of property salvage the crew of the lifeboat look to the person in charge of the vessel who engages them, and it is only in the event of the salvage money paid them being less than the amount they would be entitled to for an endeavour to save life that the crew and launchers get the difference made good to them by the institution.

In *The Enchantress* (1) Dr. Lushington said that a custom that with regard to a lifeboat company "those who stay

(1) (1860) Lush. 93, at p. 97.

shall be rewarded as those who go" would be favourably considered.

In *The Cadiz and the Boyne* (1), where a question arose as to persons not actually engaged in rendering salvage services, Sir Robert Phillimore said that "not only those who are actually employed, but also those who stay behind, are entitled to participate." In *The Auguste Legembre* (2) a lifeboat with her crew was towed astern of a salved vessel by a steam-tug employed by the National Lifeboat Institution solely for the purpose of towing the lifeboat, and it was held that, as the tug could not go out without taking the lifeboat with her, the crew of the lifeboat were to be regarded as if they formed part of the crew of the tug, though with a more moderate reward.

Aspinall, K.C., and *Balloch*, for the defendants, the owners of the *Cayo Bonito*. It is admitted that the crews of the lifeboats performed some service at request, for which they will be amply remunerated by the sum paid into court; but the position of the launchers is different. A lifeboat is launched for the purpose of saving life, and by the rules of the institution those who assist in the launching get a small sum in any event; so that they do not run the ordinary risk of no cure no pay, and cannot be considered as salvors at all, though the evidence shews that it is customary for the crew of the lifeboat to give the launchers something in case the crew earn an adequate salvage reward.

GORELL BARNES J. An accident of a somewhat extraordinary character appears to have happened to the *Cayo Bonito* whilst she was coming down the coast, for, when nearly off Whitby, her master says that the ship was put ashore owing to the North Sea pilot who was in charge of her at the time having ported for various vessels, and so getting rather near to the coast, and finally mistaking the Whitby lights for the lights of fishermen. The first the master appears to have known of the matter was when the ship was on the ground. At that time he seems to have been informed by the pilot that the ship was on the sand, but she was in fact on the rocks.

(1) (1876) 3 Asp. M. L. C. 332, at p. 334. (2) [1902] P. 123.

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That is perfectly clear from the large extent of the damage which the vessel's bottom received. This occurred at about 9.30 on the night of January 21, and the first lifeboat, the *Robert and Mary Ellis*, reached the ship about an hour and a half afterwards. The other boat, the *Upgang*, arrived somewhat later. The vessel seems to have gone on the ground at the last part of the ebb tide, and was hard and fast, and the steps taken to get her off appear to have been that first one lifeboat had an anchor put on board her, and laid it out in a N.E. direction, and then the other lifeboat, assisted by the first lifeboat, laid out a second anchor. Afterwards, when the tide had made sufficiently, with the working of her own engines and the heaving on the anchors, the vessel came off. I think the ropes attached to the second anchor parted almost immediately when hove on; but as I am not asked to apportion between the two lifeboats, it is not material for present purposes whether one rendered assistance as long as the other.

The master of the defendant vessel says that he could himself have put out anchors with the assistance of his crew, and that the vessel could have been got off without assistance by working her own engines. The contention on behalf of the lifeboats' crews is that they were asked and engaged to put out the anchors, although the vessel had been some time there, that they were doing that which relieved at any rate those on the ship from making any effort to put anchors out, if they could have done so, and that heaving on the anchors was of substantial benefit in assisting this vessel off, and at any rate kept her from swinging and getting into a worse position. I think it is difficult to be sure of the precise benefit which the services rendered by the lifeboats conferred on the ship; but I think it is clear from the facts that they were engaged to do the work, that they did it, that they were offered remuneration for it at the time, and as there has been a tender by the defendants of 250*l.* to the plaintiffs, the lifeboatmen, it would seem that even the defendants think that there was a certain benefit conferred upon the steamer by the lifeboats' services. I have discussed the matter with the Elder Brethren, and they

think that the anchors and warps were of some little benefit to the vessel, and that the lifeboats being there, standing by, engaged to assist, would also be beneficial to the crew of the defendant vessel. That being so, it is really for the Court to consider what, apart from any question of tender, would have been the award made in such circumstances as these to the lifeboat crews for the services which they actually performed.

The other point in the case is that of the claim made by Thomas Day Cass, on behalf of himself and ninety-eight others who launched the lifeboats. They seek to obtain salvage remuneration from the defendants, the owners of the *Cayo Bonito*, as having been the instruments by which the salvage services were enabled to be performed. The defendants contend that they are not in fact salvage services at all, because they say, having regard to the rules of the Lifeboat Institution, that, if those rules are considered, the first launching of the lifeboat is for the purpose of saving life, and if, when the lifeboat gets to the vessel in distress, it is found that she is not required for the purpose of saving life but for the purpose of rendering salvage services to the property, the services then become changed into salvage services to property, and only those who are actually engaged in performing the services are entitled to salvage remuneration. I am by no means sure that it is very material, in the circumstances, to consider that point, for, if the salvors in the lifeboats are entitled to salvage remuneration, the defendants suggest that the crews of the lifeboats must pay the launchers something for assisting them to earn the money which they get for salvage. If that is the right position, it is obvious that the Court, in making an award to those on the lifeboats, has simply to add so much to the award as to enable the lifeboatmen to pay the launchers sufficient to remunerate them properly.

If the other view is correct, namely, that the launchers, having taken part in launching the lifeboats for the purpose originally of saving life afterwards, having regard to those rules, when the change takes place, have enabled the lifeboat crews to render services to property, then, taking them together with the lifeboat crews, the judgment would simply be a

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divided judgment, namely, so much to the lifeboats, and so much to the launchers.

I am inclined to think that the true view is that, under these rules, those who launch the boats must contemplate that one of two things may happen—that there may be only life salvage, or there may be a change later on into salvage of property, and when they assist in the launching they take their chance of which of those things may result. I think it is clear from the regulations of the institution that that idea is in contemplation even in these rules. It certainly is in accordance with the common-sense view of the matter.

I think, therefore, that, strictly speaking, the launchers have established their claim for salvage; but in the end it comes to be a question of costs. That being the state of things, whether the remuneration of the launchers is treated as coming directly through the lifeboat crews and the institution or not, the Court has to consider what is the proper remuneration for them to receive. I think it is quite clear that those who were assisting in the launching have endeavoured to put the case too high, because the weather records shew that the weather must have been of no very real severity, and that nothing like a serious sea was produced. I have carefully considered these matters with the Elder Brethren, and my opinion is that the tender is not quite adequate, and that, having regard to the benefit which I think to some extent was received by the ship, a proper award to make in this case is the sum of 400*l.* to the crews of the lifeboats, and 100*l.* to those engaged in launching the two boats.

The defendants will pay such costs as would have been incurred if one action had been brought by all the plaintiffs.

Solicitors for coxswains and crews of the lifeboats: *Dubois & Williams, for Harold Chamberlin, Great Yarmouth.*

Solicitors for launchers: *Botterell & Roche, for Tasker Hart, Scarborough.*

Solicitors for owners of the *Cayo Bonito*; *Hollams, Sons, Coward & Hawksley.*

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Admiralty—Ship—Coaling Contract—Bill of Exchange—Liability of Master as Drawer—Qualifying Words—Notice of Dishonour—Special Circumstances excusing Delay—Bills of Exchange Act, 1882 (45 & 46 *Vict. c.* 61), *ss.* 48, 49, *sub-s.* 12; *s.* 50, *sub-s.* 1.

In pursuance of a contract for the supply of bunker coal, made between the owners of a steamship, as buyers, and the agents of the suppliers of the coal at Colombo, as sellers, the defendant, the master of the steamship, drew a bill of exchange on the owners of the vessel in favour of the suppliers, concluding with the words "value received on 300 tons coal and disbursements . . . . supplied to my vessel to enable her to complete this voyage from Melbourne to Hull, for which I hold my vessel, owners, and freight responsible." The bill was duly accepted in London, but on presentation for payment at maturity on a Saturday was dishonoured. The plaintiffs, holders of the bill, learnt through their bankers on the Monday that the bill was not paid, and, having communicated with the agents of the suppliers of the coal, ascertained that the vessel had arrived in the Tyne; but not knowing in what part, they made further inquiries without success, and on the following Thursday sent the defendant notice of dishonour by registered letter, addressing him as master of the vessel at Newcastle-on-Tyne:—

Held, by Gorell Barnes J., that the defendant was liable as drawer in accordance with the decision in *The Ripon City*, [1897] P. 226, for the wording of the bill did not by implication relieve him of that liability; and, secondly, that he was not discharged by reason of the delay in giving notice of dishonour, as the special circumstances excused that delay within the meaning of s. 49, sub-s. 12, and s. 50, sub-s. 1, of the Bills of Exchange Act, 1882.

Action by plaintiffs, the Ceylon Coaling Company, as holders, against the defendant, A. W. D. Goodrich, master of the *Elmville*, as drawer of a bill of exchange for coals supplied to, and disbursements incurred on account of, the steamer.

The case is reported on the question of what are special circumstances excusing delay in giving notice of dishonour within the meaning of s. 49, sub-s. 12, and s. 50, sub-s. 1, of the Bills of Exchange Act, 1882 (1), and as to the effect (if any),

(1) 45 & 46 Vict. c. 61, s. 48: ". . . . when a bill has been dishonoured by . . . . non-payment, notice of dishonour must be given to the drawer . . . . and any drawer . . . . to whom such notice is not given is discharged. . . ."

Sect. 49: "Notice of dishonour in

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in the case of a coal contract, on the liability of the master, as drawer of a bill of exchange, of the use in the bill of the words "for which [the amount of the bill for coals and disbursements] I hold my vessel, owners, and freight responsible."

The facts were shortly as follows:—

On December 8, 1903, an agreement was entered into between F. Childs & Co. of Cardiff, as buyers, and Mann, George & Co. of London, as agents for two suppliers, of whom Aitken, Spence & Co., of Colombo, was one, by which the suppliers (sellers) undertook to supply all bunker coal that the buyers might require for the use of the steamers of which they were the managing owners at the ports named, of which Colombo was one, "payment for coal supplied and for any disbursements to be in cash or by honour of captain's draft in sterling on the owners at thirty days' sight payable in London."

In accordance with this agreement the *Elmville*, belonging to the Agenoria Steamship Company, Limited, and of which F. Childs & Co. were the managing owners, called on February 21, 1904, at Colombo, and was supplied by Aitken, Spence & Co. with bunker coal to the value of 270*l.*, and disbursements were made on account of the master and owners for harbour dues, pilotage, and other necessaries, amounting to 33*l.* 19*s.*, in respect of which two sums the master, A. W. D. Goodrich, on February 23 drew a bill of exchange on the Agenoria Steamship Company, Limited, F. Childs & Co. (managers), Cardiff, for 303*l.* 19*s.*, payable in London to the

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order to be valid and effectual must be given in accordance with the following rules:—

"(12.) The notice may be given as soon as the bill is dishonoured, and must be given within a reasonable time thereafter.

"In the absence of special circumstances notice is not deemed to have been given within a reasonable time, unless—

"(*b*) Where the person giving and the person to receive notice reside in different places, the notice is sent off on the day after the dishonour of the bill, if there be a post at a convenient hour on that day. . . ."

Sect. 50, sub-s. 1: "Delay in giving notice of dishonour is excused where the delay is caused by circumstances beyond the control of the party giving notice, and not imputable to his default, misconduct, or negligence. . . ."

order of Aitken, Spence & Co., "value received on 300 tons coal and disbursements, and place the same with or without advice to account of coals and necessary disbursements supplied to my vessel to enable her to complete this voyage from Melbourne to Hull, for which I hold my vessel, owners, and freight responsible."

On February 25 the bill was indorsed by Aitken, Spence & Co. to the order of the Ceylon Coaling Company, the plaintiffs in the action. On March 15 the bill was accepted by F. Childs as director and manager of the Agenoria Steamship Company, Limited, and made payable at the London City and Midland Bank. The bill was handed to the National Bank for collection, and, on being presented by them at the London City and Midland Bank on the day it fell due, Saturday, April 16, was dishonoured. On the same day it was protested for non-payment, and about mid-day on Monday, April 18, the National Bank communicated the fact of dishonour to the plaintiffs, who applied the same day to Mann, George & Co. in London for information as to the whereabouts of the vessel of which the defendant was master. In answer to a telegram from Mann, George & Co., their Cardiff house replied: "*Elmville* now Tyne in hands of mortgagees; owners endeavouring make arrangements and advise holding account for few days." This telegram Mann, George & Co. in London acknowledged by letter the same evening, adding: "As you are no doubt aware, in a case of this kind there is a regular formal course laid down which has to be adhered to, and the holders of the bill have, therefore, no option but to take the necessary steps for their own protection."

On the following day (Tuesday) the secretary of the plaintiff company made further inquiries, and, having no agents or correspondents at Newcastle, searched the local newspapers to ascertain more precisely where the vessel was, but without success, and on Thursday, April 21, notice of dishonour was sent by registered letter addressed to Captain Goodrich, "Master of SS. *Elmville*, Newcastle-on-Tyne," and adding that on failure to remit the amount of the draft "we shall have to ask you to authorize us to exercise in your name or in our own

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name your right of lien against the *Elmville* in respect of the bill, and to apply any moneys we may recover in virtue of such proceedings in extinction pro tanto of the amount of your indebtedness to us on the bill."

On April 23 the writ in the present action was issued at the suit of the Ceylon Coaling Company and indorsed for 303*l.* 19*s.* principal and 5*s.* interest from April 17 to date of writ, with further interest from date of writ to judgment and costs. This writ was served on the defendant on April 25 at the Stanhope Buoys, South Shields, where the vessel was lying, having arrived there on April 15.

By his defence the defendant alleged (inter alia) that he had not due notice of dishonour of the bill; that the bill was drawn "for the accommodation of the plaintiffs, and there never was any value or consideration for the drawing or payment of the bill by the defendant," and, in the alternative, the defendant set out the substance of the coaling contract, and alleged that the coals "were not supplied on the credit of the defendant and the defendant only put his signature to the said bill for the convenience and accommodation of the suppliers of the said coals, and not as drawer or for the purpose or with the object and intention of being liable thereon or bound thereby as drawer or otherwise, and it was intended that the suppliers of the said coals should look to the said acceptors only, and that the defendant should not be in any way liable upon or in respect of the said bill as drawer or otherwise, and the defendant accordingly placed his signature on the said bill for the convenience and accommodation of the said suppliers and without any consideration and not as drawer or for the purpose and with the object and intention of being liable thereon or bound thereby as drawer or otherwise, and he never became nor was nor is liable upon or in respect of the said bill as drawer or otherwise."

On April 29 the defendant, as master of the *Elmville*, instituted an action in the High Court against the owners of the vessel for 550*l.* in respect of wages, and also for disbursements made by him on account of the steamer, including the bill sued on in this action, for which he alleged he is or may be

held liable as drawer. On the same day the mortgagees entered an action in the High Court for principal and interest, amounting to 6546*l.* 10*s.* 5*d.* On June 13 judgment was pronounced by default in the mortgagee's action subject to a reference, all questions of priority being reserved, and the vessel ordered to be sold by the marshal. On June 20 judgment was given by default in the master's action subject to a reference and to priorities.

June 23. *C. Robertson Dunlop*, for the plaintiffs, the Ceylon Coaling Company. Immediately on learning that the bill was not paid at maturity, the plaintiffs made every effort to find the defendant in order to give him notice of dishonour, but it necessarily took some little time to ascertain the whereabouts of the vessel of which he was master, as the only information to be gathered from the bill was that the *Elmville* was on a voyage from Melbourne to Hull.

The question of the liability of a master as drawer of a bill of exchange on the owners of the vessel for coals supplied under a coaling contract was fully considered in *The Ripon City* (1), where all the cases are reviewed.

[He was stopped by the Court.]

June 25. *Balloch*, for the defendant. Assuming that the master of the *Elmville* incurred the ordinary liabilities of the drawer of a bill of exchange, and that under s. 47 of the Bills of Exchange Act, 1882, when the bill was dishonoured by non-payment, an immediate right of recourse accrued to the plaintiffs as holders against him, still the drawer only undertakes to compensate the holder provided the requisite steps after dishonour are duly taken; and in this case it is submitted that the defendant was discharged by want of due notice of dishonour. The sections of the Act in question relating to notice of dishonour are precise and stringent. By s. 49, sub-s. 12 (*b*), where the person giving and the person receiving notice reside in different places, the notice must be sent off on the day after the dishonour of the bill. That would be in this case on the Monday, or at least on the Tuesday, when the secretary of

(1) [1897] P. 226.

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the plaintiff company certainly knew that the vessel was in the Tyne; but in fact the notice was not posted until the following Thursday, which was too late. In *Smith* v. *Mullett* (1), where the parties resided in London, and the plaintiff indorsee who had notice on the Monday did not give notice to his indorser until the Wednesday, Lord Ellenborough held that the defendant was discharged, and that view of the law is now embodied in sub-s. (*a*) of the same section. It is clear from the correspondence that the delay arose from time being given to F. Childs & Co. in the hope that a satisfactory arrangement would be come to; but the master, as drawer of the bill, was in the position of surety, and would be discharged by the payee, thus giving further time to the acceptor.

Secondly, it is submitted that the master of the *Elmville* on drawing the bill did not engage that on due presentation it would be accepted, or that it would be paid according to its tenor, for the use of the restrictive words, "for which I hold my vessel, owners, and freight responsible," distinguish this case from *The Ripon City* (2), and shew that the coals were supplied on the credit of the owners of the vessel, the intention being, not that the defendant should become personally liable on the draft, but that the name of the master should appear as drawer for the convenience and accommodation of the suppliers of the coal. As pointed out in that case, the object of making the master personally liable is to enable the necessaries man to exercise through him, and in his name, the lien the master of a ship has under s. 167, sub-s. 2, of the Merchant Shipping Act, 1894, in respect of disbursements or liabilities properly made or incurred by him on account of the ship. That the plaintiffs were endeavouring to make use of the master's name for this purpose is indicated in the paragraph added to the letter containing the notice of dishonour sent by the plaintiffs to the defendant on April 21; but the wording of the bill shews that the master was only an agent to fix the quantity of coal required, so as to enable the contract to be carried out which was made, not with the master, but between the buyers and sellers of the coal.

(1) (1809) 2 Camp. 208; 11 R. R. 694. (2) [1897] P. 226.

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Dunlop, in reply. In the special circumstances of this case the notice was given within a reasonable time, and is effectual, for the stringent rules of the Bills of Exchange Act, 1882, relied on by the other side, must not be pressed too far. That statute is entitled "An Act to codify the law," and is intended to express in the language of a code the effect of a long series of decisions establishing certain rules, which with reference to the "general duties of the holder" are set out in ss. 39 to 52, the particular rules relating to notice of dishonour being contained in s. 49. These rules are declaratory of the common law, and are qualified by the words, "in the absence of special circumstances," in sub-s. 12, and further qualified by the excuses for delay in s. 50, the result being that it becomes a question of fact in each case whether the time within which the notice is given is "reasonable," or, in other words, whether the delay is "caused by circumstances beyond the control of the party giving notice, and not imputable to his . . . . negligence." Here the drawer was the master of a ship with no fixed abode or known address, and even at the time when the letter giving notice of dishonour was posted, the exact place where the vessel was had not been ascertained, the plaintiffs being in doubt whether she was really in the Tyne, as Hull was her destination according to the bill. The difficulty arose because the ordinary means of information through shippers and brokers was not available, as the vessel was laid up at the Stanhope Buoys off South Shields, pending proceedings in this Court by mortgagees for her sale, and it took the Post Office authorities two or three days to find out where the vessel was and deliver the registered letter.

In *Baldwin* v. *Richardson* (1) the general rule was stated to be that "each party must give notice as soon as he reasonably can," and, in that case, a delay of several days, due to the holder making inquiries as to the indorser's address, was excused. In the case cited on behalf of the defendant, *Smith* v. *Mullett* (2), the drawer had a fixed abode and a known address. That distinguishes it from the present case; but in

(1) (1823) 1 B. & C. 245; 25 R. R. 383.

(2) 2 Camp. 208, at p. 209; 11 R. R. 694, at p. 695.

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that case Lord Ellenborough said: "The holder of a bill of exchange is not, omissis omnibus aliis negotiis, to devote himself to giving notice of dishonour. It is enough if this be done with reasonable expedition." In *Burmester* v. *Barron* (1), where the drawer had given the address "London" on the bill, it was held sufficient to post a letter to him so addressed, and leave the Post Office to find him out; so in *Mann* v. *Moors* (2) with regard to the address "Manchester" given in the bill. In *Berridge* v. *Fitzgerald* (3) Blackburn J. said: "When the holder, on the default of the acceptor, means to sue prior parties to the bill, he must give them due notice of dishonour, unless there are any circumstances to excuse it. And he would be excused if he could not find the indorser after due diligence in searching for him, and no place could be found at which to give the notice."

It is suggested on behalf of the defendant that the plaintiffs intentionally delayed giving notice of dishonour because F. Childs & Co. were pressing them to give the owners time to pay the bill; but the letter of Mann, George & Co. of April 18 shews that the request made by the owners of the vessel to hold the bill over was at once refused.

Secondly, as to the defendant in any event not being liable on the ground that there never was any value or consideration for the drawing or payment of the bill by him; but his signature was part of the consideration for the necessaries supplied, and without his signature to the bill, by way of security, the coals would not have been supplied. The exact nature of the consideration and the mode in which the transaction is carried out are explained in *The Ripon City* (4), and it is submitted that the words "for which I hold my vessel, &c.," do not enable any valid distinction to be drawn between the circumstances under which in this case the coals were supplied in pursuance of the contract between the buyer and seller and in that case, where the same defence of the non-liability of the master was put forward but failed.

(1) (1852) 17 Q. B. 828.
(2) (1825) Ry. & Moo. 249.
(3) (1869) L. R. 4 Q. B. 639, at p. 642.
(4) [1897] P. 226, at p. 231.

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[The cases of *Allen* v. *Edmundson* (1) and *Studdy* v. *Beesty* (2) were referred to.]

GORELL BARNES J. In this case the plaintiffs are the holders of a bill of exchange for 303*l.* 19*s.*, drawn by W. Goodrich, the master of the steamship *Elmville*, at Colombo, on February 23, 1904, upon the Agenoria Steamship Company, of Cardiff, the owners of the *Elmville*, and of which Messrs. Frederick Childs & Co. were managers. The bill is payable at thirty days' sight to the order of Messrs. Aitken, Spence & Co., in London, and it was indorsed by them to the plaintiffs, the Ceylon Coaling Company. It was accepted on March 15, payable at the London City and Midland Bank, London. The acceptance was on behalf of the Agenoria Steamship Company by Mr. Childs, as "director and manager."

The bill was drawn in consequence of a contract made between Messrs. Mann, George & Co. and Messrs. Frederick Childs & Co. on December 8, 1903, under which Mann, George & Co., who were agents for the suppliers of coal, who are called the sellers, were to supply to the buyers, Frederick Childs & Co., such bunker coal as they might require for the use of the steamers of which they were the managing owners. This steamer was one of them, and in the schedule or statement of places and prices there is found Colombo, and Aitken, Spence & Co. are the suppliers there. The contract provides for payment in cash or by honour of captain's draft in sterling on the owners at thirty days' sight, payable in London. It is obvious, therefore, that under that contract Mann, George & Co. were to supply coal through their agents at, amongst other places, Colombo, and they were to supply such coal as was wanted to the owners, acting through Frederick Childs & Co., as agents. Then the ordinary course of business was followed when the ship arrived at Colombo. The master had to specify what coal he was taking, and he did so, and 300 tons were supplied. He also wanted a certain amount of cash for some disbursements. The coal came to 270*l.*, and the disbursements, cash, &c., to 33*l.* 19*s.*; and for that sum of 303*l.* 19*s.* the captain in the

(1) (1848) 2 Ex. 719, at p. 723. (2) W. N. (1889) 14 (C. A.)

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ordinary course of business, gave the draft which is now sued upon. In the case of *The Ripon City* (1) I went through the ordinary course of business, and pointed out how a draft given by the master in such circumstances was part of the consideration for the supply, because it enabled the suppliers to use the master's name for the purpose of enforcing his lien against the ship. On Saturday, April 16, when the bill became due, it was presented to the bankers mentioned in the acceptance. It was not met and was duly protested. On the following Monday, about mid-day, the plaintiffs knew that the bill had been dishonoured.

Now, according to the bill, the vessel is described as on a voyage from Melbourne to Hull, and it is obvious that without some inquiry the plaintiffs could not know where the ship was nor where the master was supposed to be, or was. So the first thing they did was, through their secretary, to inquire on the Monday from Mann, George & Co., who had been parties to the contract, where the ship was. Then some telegrams passed between Mann, George & Co., of London, and their branch at Cardiff, for the purpose of finding out where the ship was, and a telegram was sent, received in London on April 18, stating that the *Elmville* was now in the Tyne in the hands of mortgagees, and the owners were endeavouring to make arrangements, and advising holding the account for a few days. That was followed up by letters, and on Tuesday morning the secretary says he knew about this information. Apparently he did not get the information contained in the telegram on the Monday evening, probably having left the office; but on the Tuesday morning he did, and that told him the vessel was in the Tyne.

According to the evidence of the secretary, he required more definite information from Mann, George & Co., and he looked into the local papers, but did not succeed in finding exactly where the ship was. However, on the 21st, as time was going on, and not having had further information, he posted to the master, the defendant in this case, addressing him as "The Master of the *Elmville*, Newcastle-on-Tyne," a registered

(1) [1897] P. 226.

letter containing a statement about the bill, and notice that it had been dishonoured. According to the Post Office paper put in, that letter was posted as a registered letter on the 21st, but being addressed in that way it was delivered, on the 24th, it says in the receipt, but I think, according to the master's evidence, it was the 25th.

The plaintiffs are now suing the master upon the bill, and the master has already brought an action, in this branch of the Court, against the ship, in which he is seeking to recover for his wages and disbursements, and, amongst other things, for the amount of this bill if he is liable upon it. That suit has been before the Court, a decree for his wages and disbursements has been made, and it has been referred to the registrar to ascertain what those wages and disbursements are; and if this bill is one for which he is liable, no doubt it will fall within what is due from the defendant shipowners, or rather their ship—the action is in rem—to the defendant in the present case. He is really defending this action, because if he is made liable he will have a right to recover against the ship; but if he is not liable and had not fought the case it might be said in his suit against the ship, "You ought to have fought this action and you cannot claim."

The first point taken on behalf of the defendant is that he did not have due notice of dishonour, and, in the absence of special circumstances, there is no doubt that the notice of dishonour would be too late. Sub-s. 12 of s. 49 and sub-s. 1 of s. 50 of the Bills of Exchange Act, 1882, in substance shew that the notice of dishonour would be too late unless the circumstances of the case are such that there had been no delay, beyond what is reasonable in the circumstances, in giving notice of dishonour to the master. That depends upon the set of circumstances which I have referred to, namely, that the plaintiffs holding the bill did not know what the real address of the master was, and had to find it out, and they never did really find it out properly in the true sense; but, in the expectation that it might possibly do so, they took their chance on the 21st of the letter which was sent to "The Master of the *Elmville*, Newcastle-on-Tyne," reaching the

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defendant. It is quite clear that they had to act with promptness and within a reasonable time, and had to make due inquiries and, as soon as they could in reason, give notice. It is simply a question of fact, and I think, having regard to the times I have mentioned and to the circumstances of the case, that the plaintiffs acted with due diligence in making inquiries and sending their notice, and I think it was, in the circumstances, within a time entitling the plaintiffs to sue the master upon the bill.

The other point is more a point of law. If this bill were in the ordinary form, counsel for the defendant does not dispute that it would be a bill upon which the master could be sued. The matter has been fully considered in the case of *The Ripon City* (1), and there is no doubt that a master, ordering coals and having to give his draft, under a contract for them, makes himself personally liable. That would be so on a bill where there is no qualification; but it is said that this bill is qualified, so as not to make the master liable. The words relied upon are: "In London the sum of pounds three hundred and three and nineteen shillings only Value received on 300 tons coal and disbursements and place the same with or without advice to account of coals and necessary disbursements supplied to my vessel to enable her to complete this voyage from Melbourne to Hull for which I hold my vessel, owners, and freight responsible." In some unexplained way counsel for the defendant suggests that those are words which release the master from personal liability and impose the obligation upon the ship, her owners, and freight only, and that that is what the owners of the coal looked to. I fail to see that there is any such limitation upon the bill, and it seems to me the words leave the master just as liable as if the words were not there. It is a mere statement of what has happened and the position of the master, and represents, I think, truly, that he is personally liable but will look himself to the vessel, his owners, and the freight. The second point must therefore also be decided against the defendant, and I think the plaintiffs are entitled to judgment against the master, the defendant, for the sum of

(1) [1897] P. 226.

303*l.* 19*s.*, the amount of the bill, together with interest from the date of dishonour, April 16, until judgment, and costs.

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Solicitors for plaintiffs: *Pritchard & Sons.*

Solicitors for defendant: *Stokes & Stokes, for Ingledew & Fenwick, Newcastle-on-Tyne.*

T. L. M.

THE HARE.

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Feb. 22, 23, 24.

Admiralty—Collision—Manchester Ship Canal—Fog—Regulations for Preventing Collisions at Sea, 1897, *arts.* 16, 30—*Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *s.* 418.

Semble: The Regulations for Preventing Collisions at Sea do not apply to the Manchester Ship Canal; but, assuming that they do, the second paragraph of art. 16 of those regulations—by which "a steam vessel hearing, apparently forward of her beam, the fog signal of a vessel the position of which is not ascertained, shall, so far as the circumstances of the case admit, stop her engines. . . ."—will not be compulsory, for the approaching vessel, of which the fog signal is heard, must be in the canal, and presumably on her right side, so that her position is, in the circumstances, sufficiently ascertained by those in charge of the vessel hearing the whistle, to absolve them from the obligation to "stop her engines," and they can, therefore, continue to navigate their vessel with caution on her own right side, so as to pass the other vessel.

ACTION of damage by collision.

The plaintiffs were the owners of the *South Coast*. The defendants were the owners of the *Hare*.

The facts—so far as material on the question whether the Regulations for Preventing Collisions at Sea apply at all to such waters as the Manchester Ship Canal, and, if applicable, whether the second paragraph of art. 16 of those regulations (1) would be binding—were shortly as follows:—

(1) Regulations for Preventing Collisions at Sea, 1897:—

Art. 16: "Every vessel shall, in a fog, mist, falling snow, or heavy rainstorms, go at a moderate speed, having careful regard to the existing circumstances and conditions.

"A steam vessel hearing, apparently forward of her beam, the fog signal of a vessel the position of which is not ascertained, shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over."

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On December 6, 1903, about 1.30 P.M., the weather being foggy and the tide slack, the *South Coast*—a screw steamship of 421 tons gross register, with engines of 78 horse power nominal and a crew of twelve hands—was proceeding down the Manchester Ship Canal, near the Weaver Sluices, on a voyage from Manchester to Plymouth, with a general cargo, when she came into collision with the *Hare*, a screw steamship of 804 tons gross register, with engines of 210 horse power nominal and a crew of twenty-four hands, proceeding up the canal on a voyage from Dublin to Manchester with a general cargo and passengers. According to the plaintiffs, the engines of the *South Coast* were being moved ahead and stopped at intervals in order to maintain a proper distance from the vessel proceeding down ahead, and her steam-whistle was being duly sounded. In these circumstances it was alleged by the plaintiffs that the *Hare* was seen coming towards the *South Coast* at high speed on the wrong side of the channel, and though the helm of the *South Coast* was put hard-a-port, her engines full speed astern, and three blasts blown on her whistle, the *Hare* came on and struck the stem and starboard bow of the *South Coast*, cutting so deeply into her that the vessels remained locked together for some time after the collision.

According to the defence and counter-claim the speed of the *Hare* was reduced on account of fog till, when the *South Coast* was seen right ahead and two ships' lengths off, it was only some one to two knots. It was further alleged that before the collision the helm of the *Hare* was hard-a-ported, her engines put full speed astern, and three short blasts blown on her whistle.

Each side charged the other with failure to comply with arts. 4, 6, 9, and 15 (1) of the Regulations and Bye Laws of

(1) Manchester Ship Canal. Navigation and Dock Regulations:—

"4. The maximum speed in the canal must not exceed six miles an hour, unless a special permit has been obtained from the company's general superintendent.

"6. Vessels must at all times be navigated with care and caution, and in such manner as will not involve risk of collision. . . .

"9. All vessels navigating the canal must carry and use proper signals in accordance with the schedule attached hereto.

"15. When vessels proceeding in

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the Manchester Ship Canal, 1902; and the defendants, in addition, charged the plaintiffs with a breach of arts. 15 (sound signals in fog) and 16 (set out above) of the Regulations for Preventing Collisions at Sea.

Aspinall, K.C., and *Lewis Noad*, for the plaintiffs, the owners of the *South Coast*. The speed of the defendants' vessel was excessive considering the state of the weather, and those in charge of her committed a breach of art. 15 of the regulations of the canal by navigating her on the wrong side of the channel.

The defendants allege a breach on the part of the plaintiffs' vessel of art. 16 of the Regulations for Preventing Collisions at Sea; but those regulations do not apply to such waters as the Manchester Ship Canal, where there is a complete code for the safe navigation of the canal duly made by the local authority within the meaning of art. 30 of the Regulations for Preventing Collisions at Sea, which makes a special reservation of rules for harbour and inland navigation. Even assuming that the sea regulations do apply, art. 16 would be excluded by the general scope of the by-laws and regulations of the canal: see *The Carlotta*. (1) It is further to be observed that by s. 418 of the Merchant Shipping Act, 1894, power is only given to make, by Order in Council, regulations for the prevention of collisions "at sea"—not in inland waters such as the canal in question.

Laing, K.C., and *Alexander D. Bateson*, for the defendants, the owners of the *Hare*. The preliminary article of the Regulations for Preventing Collisions at Sea states that "These rules shall be followed by all vessels upon the high seas, and in all waters connected therewith navigable by sea-going vessels." Those words include such waters as the Manchester Ship Canal, and there is no "special rule duly made by local

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opposite directions are approaching one another, each vessel must be steered as closely as possible with safety to her own starboard side of the canal, so that they may pass on the port side of each other; each vessel must reduce her speed to dead slow, or, if necessary, stop the engine while passing each other, so as to ensure their passing in safety. . . ."

(1) [1899] P. 223.

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authority" which, under art. 30 of the sea rules, would exclude art. 16 of those rules, and, if there were any such rule, it would not have any binding force, as the regulations purporting to deal with the navigation of the Manchester Ship Canal have not been confirmed by the Board of Trade as required by s. 198 of the Manchester Ship Canal Act, 1885. Art. 16, therefore, applies, and those in charge of the *South Coast* should have stopped her engines. The necessity of complying with the second paragraph of this article has been repeatedly insisted upon: see *The Koning Willem I.* (1), where *The Bernard Hall* (2) is referred to.

Aspinall, K.C., in reply. To interpolate such a provision as that a vessel must "stop her engines" on hearing the fog signal of a vessel apparently forward of her beam, would not only be unnecessary, as there are no crossing vessels, but it would be inconvenient and dangerous in a canal where there are vessels ahead and astern. The words in the second paragraph of art. 16, "so far as the circumstances of the case admit," also exclude the application of the rule to vessels in the canal, for the circumstances do not admit of the enforcement of the rule.

GORELL BARNES J. This is the case of a collision which took place between the steamships *South Coast* and *Hare* on December 6, 1903, in the Manchester Ship Canal. The weather at the time was foggy, and the tide had nearly ceased to operate at all—it was slack—such tide, I mean, as seems to be allowed to run in during the time that the lock gates are open at Eastham.

The *South Coast* was proceeding down and the *Hare* was proceeding up the canal. Both vessels were sounding their whistles for fog, and they came into collision near the Weaver Sluices practically stem on, the stem of the *Hare* striking the starboard bow of the *South Coast* about two feet from the stem. The question is which of these vessels was to blame for the collision, and, in order to determine this question, I have to ascertain whether the collision happened, to use an

(1) [1903] P. 114. (2) (1902) 9 Asp. M. L. C. 300.

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ordinary expression, in the water of the plaintiffs or in the water of the defendants, each side maintaining that it took place on their own side of the canal, and, therefore, that the other ship was in the wrong. With the assistance of the Elder Brethren, I have come to a conclusion of fact which enables me to decide the case, though there are points connected with it which involve some little difficulty, but they are not, to my mind, essential features, and I will shortly deal with them in their order. The first of these points is taken on behalf of the defendants, and it is this—that the engines of the plaintiffs' vessel were not stopped on hearing the whistle of the defendants' ship. The plaintiffs' master said, "I heard a whistle once before she came up before I saw her." Upon his evidence it would seem that he only stopped his engines when he saw what he described as a loom, and then thought it was a ship. The point made by the defendants is that the plaintiffs' vessel must be to blame because her engines were not stopped on hearing the whistle of the defendants' ship before even she was seen. It is said that that makes the plaintiffs' vessel responsible because of art. 16 of the sea regulations, which is that "a steam vessel hearing, apparently forward of her beam, the fog signal of a vessel the position of which is not ascertained, shall, so far as the circumstances of the case admit, stop her engines and then navigate with caution until danger of collision is over." The answer made to that point is that that regulation does not apply, and that none of the sea regulations do apply to the Manchester Ship Canal. I am not at all satisfied that it is necessary for me to express a positive opinion about that point, but my present impression is that the sea regulations do not apply to the Manchester Ship Canal. These regulations are made in pursuance of s. 418 of the Merchant Shipping Act, 1894, which runs: "Her Majesty may, on the joint recommendation of the Admiralty and the Board of Trade, by Order in Council, make regulations for the prevention of collisions at sea. . . ." Now the plaintiffs say that the regulations only apply for the purpose of preventing collisions at sea, and that this was not a collision which took place at sea. The defendants, however, say that it did take place at sea

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within the meaning of the section, and that the words "at sea" have been interpreted by those who drew the regulations as including such waters as the Manchester Ship Canal, because the preliminary is as follows: "These rules shall be followed by all vessels upon the high seas, and in all waters connected therewith, navigable by sea-going vessels." I do not read that preliminary article as intended to extend the word "sea" beyond its proper meaning, and my view on this subject has already been expressed in the case of *The Carlotta*. (1)

If the sea rules do not apply, there is an end of that point, and my view is that they do not apply to the ship canal. I cannot see how they could strictly be said to apply to a piece of navigable channel artificially constructed, terminating at Eastham in locks which only at times admit the sea, and which has locks at different places all the way up, from place to place, and where it is necessary to do what the pilot of the *Rondale* said—namely, that they were in every lock together down to Latchford. I should have thought it was tolerably clear that the upper part cannot be said to be connected with the sea, at any rate, and I do not see very well how the term could be applied to the lower part, even if it is, for a portion of the time, allowed to have an inflow of sea water, when the gates are open. Certainly it would be, I think, extremely inconvenient if the sea regulations were so held to apply. It would have this curious result—that vessels navigating in the canal near a part of the sea, to which they cannot get, and vessels navigating in the sea, might be hearing whistles forward of their beam, and for which they would have to act, though by no possibility could they get at each other. Counsel for the plaintiffs took a further point—namely, that even if the sea rules apply, then there is art. 30 of the regulations, which provides "that nothing in these rules shall interfere with the operation of a special rule, duly made by local authority, relative to the navigation of any harbour, river, or inland waters." They argued that there is a scheme of rules made by the local authority which regulates the navigation of the Manchester

(1) [1899] P. 223.

Ship Canal, and they referred to certain of those regulations, particularly 4, 6, and 15, and to the schedule of signals which are contained in those regulations, as shewing what vessels have to do when they are meeting each other and what they have to do to avoid danger of collision. But there seems some difficulty in treating those regulations as amounting to "a special rule duly made by local authority," because counsel for the defendants pointed out that under s. 198 of the Manchester Ship Canal Act, 1885, the only power to make by-laws or regulations applicable to such a matter as I am considering is power to make regulations "for regulating the conduct of the owners masters and crews of vessels propelled by steam with respect to the rate of speed at which they may proceed within the canal docks or works or any part or parts thereof respectively and for requiring such vessels to stop or slow their engines at such times and places as the company may require and to keep the advertised times of sailing and for regulating the taking on board landing or putting out of passengers"—which does not in terms cover all the matters that have to be considered with regard to signals, lights, and so forth, on board ships; and further, that in the latter part of the section there is a provision that "such by-laws except so far as they relate solely to the company or their officers or servants shall be subject to the provisions with respect to by-laws of the Harbours Docks and Piers Clauses Act 1847 except s. 85 of that Act but no such by-laws shall have any force or effect unless and until the same be confirmed by the Board of Trade." Sect. 85 of the Act of 1847, which is there referred to, provides that no by-laws shall come into operation until allowed in the manner prescribed and approved by one of the judges. Now, for one of the judges is substituted the Board of Trade; but I understand that the particular regulations which have been relied upon by counsel for the plaintiffs have not been confirmed by the Board of Trade. That is the statement made to me. So that the point they take would not seem to be satisfactorily established. The result, however, would be that although the regulations may not, perhaps, be strictly termed enforceable, as being duly made,

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yet still they shew what the practice of navigation is; and so far as the actual seamanship and navigation of those two vessels is concerned, both parties have argued the case before me as if it was their duty to keep to their own side and to act with reasonable caution, and stop and reverse and pass port side to port side.

There is one other point I might mention, which seems to me important, and that is, that even if art. 16 applies, yet the rule applies only where the position of the vessel which makes the fog signal is not ascertained; and I think in this case that even if that rule is treated as applicable, the position in the particular circumstances of the case was such that when the whistle of the other vessel was heard that vessel was in a position which was ascertained. It is obvious that she must be in the canal—they need not trouble themselves about vessels in the river—and therefore her ordinary position in the canal must be ascertained if both vessels keep to their right side. Her distance, too, must be reasonably ascertained, because the *Rondale* was proceeding ahead of the plaintiffs' vessel and between her and the *Hare*. So the Elder Brethren think, and I agree, that if art. 16 applies the circumstances were such that it was reasonable to say that the position of the *Hare* was sufficiently ascertained to comply with the rule. I also think it is worth while pointing out that the rules must be worked with a certain amount of reason. Counsel for the plaintiffs further relied upon the words in the second part of art. 16, "so far as the circumstances of the case admit." It would be very awkward if every time a whistle was heard and there were a number of vessels going down and others were coming up, meeting each other, it was obligatory upon any vessel in a lock to stop. It would seriously hamper vessels astern; and although there is a rule in the schedule of signals providing a special signal to be made if a vessel is obliged to stop when another vessel is following her, the effect of stopping for every whistle heard would be to stop all the traffic, and there would be, it seems to me, a general standstill, which is not desirable. For these reasons, which I give without any lengthy consideration, I am of opinion that the plaintiffs' vessel cannot be held

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to blame simply because she did not stop her engines upon hearing the whistle of the *Hare*.

Now as to the real merits of the case. [The learned judge then dealt with the facts of the collision, and found the *Hare* alone to blame on the ground that she was on the wrong side of the channel, and was going too fast having regard to the state of the weather.]

Solicitors for plaintiffs, owners of the *South Coast*: *Hill, Dickinson, Dickinson, Hill & Roberts, Liverpool.*

Solicitors for defendants, owners of the *Hare*: *Batesons, Warr & Wimshurst, Liverpool.*

T. L. M.

[IN THE COURT OF APPEAL.]

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July 11.

THE CHEAPSIDE.

Admiralty—Practice—Jurisdiction—Salvage—Action in Rem—Foreign plaintiffs—Counter-claim in Personam—Demurrage.

The owners, master, and crew of a steam-tug, all foreigners out of the jurisdiction, commenced an action in rem in the Admiralty Division against the defendants, owners of a British ship and her freight, for salvage services alleged to have been rendered to the defendants' vessel in Northern Russia. The defendants, besides defending the action, set up a counter-claim in personam for demurrage alleged to be due by the owners of the steam-tug under two charterparties. On an application by the plaintiffs to strike out the counter-claim:—

Held, by the Court of Appeal (Collins M.R. and Stirling L.J.), that a judge of the Admiralty Division, as a judge of the High Court, has jurisdiction to try such a counter-claim, and that the discretion of the judge, in refusing to strike out the counter-claim on the ground of embarrassment, had been rightly exercised.

Griendtoveen v. *Hamlyn & Co.*, (1892) 8 Times L. R. 231, followed.

APPEAL by plaintiffs, the owners, master, and crew of the steam-tug *Oscar Dickson*, of Sundswall, in an action in rem for salvage, against the refusal of Gorell Barnes J. to strike out a counter-claim for demurrage set up by the defendants, the owners of the British steamship *Cheapside* and her freight.

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The plaintiffs by their statement of claim alleged that on September 22, 1903, the steamship *Cheapside* of the port of London, and belonging to the defendants, completed loading a cargo of wood for carriage to London at the plaintiffs' sawmill on the river Petschora in Northern Russia, except such portion as she would take on board from the plaintiffs' lighter at the mouth of the river, and that it was agreed that the tug *Oscar Dickson* should tow the lighter and cargo down the river ahead of the *Cheapside*, and act as a pilot boat to that vessel. It was further alleged that, on proceeding down the river, the *Cheapside* grounded several times, and on each occasion was got off by the *Oscar Dickson*, and finally, owing to bad weather and the accumulation of ice, the lighter with her cargo was abandoned, and, on September 30, the *Cheapside* was towed by the tug across the bar and enabled to proceed on her voyage.

The defendants, the owners of the *Cheapside* and her freight, by their defence admitted the substantial accuracy of the incidents mentioned in the statement of claim, but denied that any salvage services had been rendered by the plaintiffs, as the defendants alleged that the *Oscar Dickson* was the steam-tug ordered by the charterers to attend on the *Cheapside*, and that it was the practice for the steam-tug, for an inclusive fee per standard, to indicate the channel and to render towage assistance should the steamship ground.

By their counter-claim the defendants alleged that they had suffered damage through detention of their vessel by the plaintiffs in breach of two charterparties dated respectively February 23 and July 24, 1903, under which the *Cheapside* was chartered by the Nordryska Company, owners of the *Oscar Dickson*, to carry cargoes to and from the Petschora river, and the defendants claimed 170*l*., being two and a half days' and six days' demurrage respectively under the two charterparties, or eight and a half days in all at 20*l*. per day.

Dawson Miller, for the appellants (plaintiffs), the owners, master, and crew of the *Oscar Dickson*. The plaintiffs are suing for salvage in an ordinary action in rem, but the counter-claim is in personam in respect of a claim which is not

the subject of Admiralty jurisdiction in the High Court, though there is jurisdiction by statute in a county court, and it is submitted, therefore, that the counter-claim should be struck out.

In *The Bowesfield* (1) Butt J. held that the Court had no power to add parties as defendants, so as to convert an action in rem into an action in personam; but, assuming that, as a branch of the High Court, the Admiralty Court would have jurisdiction to entertain this counter-claim, then it is submitted that it should be struck out on the ground of embarrassment as tending, within the meaning of Order XIX., r. 27, to delay the fair trial of the action, for the owners, master, and crew of the *Oscar Dickson* are the plaintiffs in the action in rem; but the master and crew are not parties to the counter-claim, which is against the owners of the tug as charterers of the *Cheapside*, without any names being set out as required in an action in personam.

[COLLINS M.R. That might be ground for amendment, but not for striking out the counter-claim.]

Great inconvenience would result from attempting to try the two actions together, for the charterparties relate, not only to the voyage in question, but to different voyages, and different sets of witnesses would have to be called who would have nothing to do with the salvage action. In *The Germanic* (2) the plaintiffs, the owners of a steamship, issued a writ in rem against the owners and parties interested in the steamship *Germanic* for damage by collision, and then applied to add, as a defendant, the pilot who was in charge of the *Germanic* at the time of the collision. It was pointed out that the joinder of the claim in personam against the pilot, in the action in rem against the ship, would raise complicated issues which it would be difficult to try together, for the rule in Admiralty as to the division of damages in cases of both vessels being to blame applies as between ships only, whilst the pilot would be entitled to rely upon the common law principles applying to the case of contributory negligence. The trial of the action in rem would also be by the judge with nautical assessors,

(1) (1884) 5 Asp. M. L. C. 265. (2) [1896] P. 84.

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whilst it would be the province of a jury to find the facts in respect of the claim in personam against the pilot. In the result this Court held that, assuming there was jurisdiction, the order ought not, as a matter of discretion, to be made, as the trial of the action might thereby be embarrassed. Similar considerations based on the fact that the plaintiff's action is an Admiralty claim in rem whilst the defendants' counter-claim is a common law action in personam will induce this Court to strike out the counter-claim in the present case.

D. Stephens, for the respondents (defendants), contra. The Admiralty Court ceased to exist when, by virtue of s. 16 of the Judicature Act, 1873, its jurisdiction was transferred to, and vested in, the High Court of Justice. A judge sitting in Admiralty is, therefore, a judge of the High Court, and has jurisdiction to try the counter-claim. By s. 24, sub-s. 3, of the same Judicature Act a judge has power to grant to any defendant, in respect of any counter-claim asserted by him, all such relief against any plaintiff as such defendant shall have properly claimed by his pleading to the same extent as if the defendant had brought an action against the plaintiff for the purpose. The defendants' counter-claim in personam can, therefore, be tried with the plaintiffs' action in rem, either with or without assessors or with or without a jury, and the judge can, if necessary, and as has been done on previous occasions, sit with assessors and a jury: see Williams and Bruce's Admiralty Practice, 3rd ed. p. 442, note to Order XXXVI., r. 7, sub-s. (*a*).

If a plaintiff, resident out of the jurisdiction, commences an action here, and so brings himself within the jurisdiction, he must submit to a counter-claim being raised against him: *Griendtoveen* v. *Hamlyn & Co.* (1), where it was held that a foreign firm suing in an English Court was liable to have a counter-claim pleaded against the firm, even though the nature of the counter-claim was such as to preclude the possibility of bringing an action upon it under Order XI. relating to service out of the jurisdiction.

[He was stopped by the Court.]

(1) 8 Times L. R. 231.

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COLLINS M.R. This is an appeal from a decision of Gorell Barnes J. refusing to strike out a counter-claim. The plaintiffs, the owners, master, and crew of a tug-boat, which was also acting as a pilot boat, have brought an action for salvage, and the owners of the tug-boat are out of the jurisdiction. The defendants, the owners of the vessel alleged to have been salved and of her freight, set up not only a defence but a cross-claim, by way of counter-claim, against the owners of the pilot boat for delay on their part as charterers of the defendants' vessel. That counter-claim undoubtedly is an action in personam and not an action in rem, and accordingly the plaintiffs say, "This is an attempt to join by way of counter-claim an action in personam with an action in rem, and the Court of Admiralty has no jurisdiction to entertain such an action in personam." However, this point has been raised before, and it has been decided that the judge of the Court of Admiralty does not cease to be a judge of the High Court because he is judge of the Court of Admiralty, and although as judge of the Court of Admiralty he may have no jurisdiction in such a case as this in personam, as judge of the High Court he has, and whether or not he can blend those two jurisdictions is a matter for his discretion, subject to review by this Court.

In this case the judge of the Court of Admiralty has endeavoured to do justice by not dividing the two jurisdictions, but by availing himself of the fact that he has a double jurisdiction, which will enable him to do justice in this way. The defendants would not be in a position to bring this counter-claim in a separate action, for the reason that the plaintiffs are out of the jurisdiction. There would be great difficulty under our procedure in serving them. The defendants, therefore, desire to avail themselves of the fact that the plaintiffs have sought this jurisdiction; and for the reasons that were expressed in very forcible and clear language by Lord Coleridge in the case of *Griendtoveen* v. *Hamlyn & Co.* (1), it is perfectly clear that that is a proper course for the defendants to take, and one which this Court would sanction. Accordingly the learned judge, founding himself upon that case, thought that, having

(1) 8 Times L. R. 231.

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the jurisdiction, as was decided in another case in the Court of Appeal, he would be abundantly justified in exercising it in this case, for, in this case, the difficulty does not exist which was felt by the Court of Appeal in *The Germanic* (1), namely, that if it had been attempted there to try, in one action, an action in rem, and a claim in personam, different legal standards would have been applicable, because questions of negligence and contributory negligence might have arisen, and, therefore, it might have been necessary to apply the common law standard to one part of the case, where contributory negligence came in question, and the Admiralty standard to another part where no question of contributory negligence could arise. There might also have been the complication of having a jury in one part of the case and the judge only in another part. This case is entirely free from all those difficulties. To begin with, the question of contributory negligence does not arise, and the law to be applied, whether by the judge of the Admiralty Court or by the High Court judge, is the same. Secondly, in regard to having a jury for one cause of action and the judge for the other, that difficulty also does not exist, because the defendants, who seek to try what I may call a common law action, in which a jury may be forced upon them, may themselves ask for a jury, in substitution of the Admiralty Court assessors; and if the judge thought the two cases could be better tried by a jury, and the plaintiffs were to insist that the counter-claim against them should be tried by a jury, the judge could, if he thought fit, have both actions tried by a jury. In my opinion the learned judge has properly exercised his discretion and was within his jurisdiction in so doing.

STIRLING L.J. concurred.

Appeal dismissed.
Respondents' (defendants') costs in any event.

Solicitors for appellants (plaintiffs): *Trinder, Capron & Co.*
Solicitors for respondents (defendants): *Holman, Birdwood & Co.*

(1) [1896] P. 84. T. L. M.

THE FRIESLAND.

1904
July 8, 19.

Admiralty—Salvage—Towage Contract between Owners of Salving and Salved Vessels—Independent Rights of Master and Crew of Salving Vessel.

Owners in Liverpool were informed by telegraph that their vessel was lying disabled off the south coast of Ireland, and agreed with the owners of a tug, known to be in the neighbourhood of the disabled vessel, that their vessel should be towed to Liverpool on the usual towage terms per tide; but, before the owners of the tug could instruct their tug master, and before the agreement was made, the tug master had proceeded to the disabled vessel, and had commenced towing her to Liverpool. In an action of salvage brought by the owners, master, and crew of the tug against the owners of the disabled vessel, her cargo and freight:—

Held, by the President (Sir F. H. Jeune), that the owners of the tug were bound by the towage agreement; but, following *The Inchmaree*, [1899] P. 111, that her master and crew had acquired independent rights which must be dealt with on salvage terms.

ACTION OF SALVAGE.

The plaintiffs were the owners, master, and crew of the *Cruizer*. The defendants were the owners of the *Friesland*, her cargo and freight.

The case is reported on the question of the independent right to salvage of the master and crew of a salving vessel in respect of services in part performed prior to a towage agreement being concluded between the owners of the salved and salving vessels.

The material facts were shortly as follows:—

On May 17, 1904, about 11.15 P.M., the wind being a moderate breeze from W.N.W., the weather fine and sea smooth, the *Friesland*—a screw steamship belonging to the Société Anonyme de Navigation Belge Américaine, of 7110 tons gross register, engines of 746 horse power nominal, a crew of 130 hands, and of the value of 50,000*l.*, cargo 44,000*l.*, freight at risk 808*l.*, in all 94,808*l.*—was about eleven miles S.E. by S. of Mine Head on a voyage from Philadelphia to Liverpool, viâ Queenstown, with a general cargo and 138 passengers, when her tunnel shaft broke. The vessel drifted slowly before the wind, and about 4 A.M. on the 18th the Cunard steamship *Aurania* was sighted, and, at the request of the master of the *Friesland*, the

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master of the *Aurania* undertook to communicate with the shore by wireless telegraphy indicating her position. The message sent by the *Aurania* was, about 9 A.M., received by the Liverpool manager of the Belgian company, who communicated with the owners of the *Cruizer*, a screw steam-tug of the port of Liverpool, of 379 tons gross register, manned by a crew of thirteen hands, with engines working up to 1000 horse power, and of the value of 10,000*l*. About 9.15 an agreement was entered into that the *Cruizer*, which was assumed to be lying at anchor at Dunmore, County Waterford, Ireland, should proceed to the *Friesland* and tow her to Liverpool upon the usual tide-work terms, namely, 20*l*. per tide, with 5*l*. extra per tide whilst actually towing, and 5*l*. per tide for use of tug's hawser. In pursuance of this agreement a telegram was despatched to Dunmore by the owners of the *Cruizer* instructing that tug to proceed in search of the *Friesland*. Before the arrival of the telegram, the master of the *Cruizer* had observed, and, about 9.30 A.M., proceeded towards the *Friesland*, which was lying about eighteen miles S.S.W. of Dunmore with two balls on her foremast, and apparently in difficulty, with her head to the southward. About 11 A.M. the *Cruizer* came up with the *Friesland* and agreed, according to the evidence of the plaintiffs, to render that vessel assistance on salvage terms; but, according to the evidence of the defendants, the question of remuneration was to be left to the respective owners. The *Cruizer* made fast, using her own rope, the wind by this time having freshened from the N.W. with some sea. She succeeded in getting the *Friesland* round and towed her until about 2.30 A.M. on the 19th, when the steam-tug *Kingfisher* came up, and the two tugs continued the towage until about 9 P.M. on the same day, when they brought the *Friesland*, after a towage of about 200 miles, to a position of safety in the river Mersey.

By paragraph 6 of the statement of claim the plaintiffs alleged that "After the *Cruizer* had left Dunmore to go to the assistance of the *Friesland*, but before the services were rendered, the owners of the *Friesland*, by their representative at Liverpool, informed the owners of the *Cruizer* that the *Friesland* was reported to be lying off Mine Head disabled, and they asked

the owners of the *Cruizer* if the *Cruizer* would tow the *Friesland* to Liverpool upon the usual towage terms, to which the owners of the *Cruizer* agreed; but such agreement was made conditional upon the *Cruizer* being still at Dunmore and not having proceeded to the assistance of the *Friesland*, and such agreement was subject to the master of the *Cruizer* not making any agreement with the master of the *Friesland* for remuneration on the basis of salvage."

By their defence the defendants denied "that the services rendered by the plaintiffs to the *Friesland* were salvage services," and they said "that at the time when the same were rendered the *Cruizer* had been engaged to perform the said services by agreement between the respective owners upon the terms mentioned," and in satisfaction of the plaintiffs' claim they paid 120*l.* into court.

July 8. *Carver, K.C.*, and *Crawford*, for the plaintiffs, the owners, master, and crew of the tug *Cruizer*. The *Friesland*, her cargo, and freight were rescued from a position of considerable danger, for she was a disabled vessel, her shaft being broken, and, according to the evidence, when taken in tow was lying in the trough of the sea rolling heavily. To approach a vessel under such circumstances is always a work of difficulty and requires skill. The towage also was not easy, as the *Friesland* steered badly, her propeller being fast. In the circumstances, therefore, this was a valuable salvage service promptly rendered to property of great value, and the owners of the *Cruizer* cannot be bound by the conditional agreement, for the *Cruizer* had proceeded to the assistance of the *Friesland* before the agreement had been concluded, and before the master of the *Cruizer* had received any instructions from his owners, and the master of the *Friesland* had agreed with the master of the *Cruizer* to receive towage assistance on the basis of salvage before he knew of any conditional agreement having been made. In any event the master and crew of the *Cruizer* are not bound by the agreement as they had already left Dunmore in the capacity of salvors, and the salvage services had not only in fact commenced but had been in part performed.

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[JEUNE P. The distinction between the rights of the master and crew and of the owners of the *Cruizer* is not taken in the pleadings.]

No; but that can be cured by leave to amend.

[JEUNE P. For the purpose of raising that point the pleadings may be taken as amended.]

Aspinall K.C., and *Dawson Miller*, for the defendants, the owners of the *Friesland*, her cargo and freight. The services rendered by the *Cruizer* to the *Friesland* were nothing more than towage. They were performed in pursuance of an agreement between the respective owners, under the terms of which, as the *Cruizer* was engaged four tides, there is due from the defendants the sum tendered by them, namely, 120*l*.

The *Cruizer* did not get hold of the *Friesland* until about 11 A.M., the agreement having been concluded about 9.30, that is, before the work commenced. The agreement is, therefore, binding, for it was made with knowledge of the material facts as to the vessel's condition. Under these circumstances, assuming that such an agreement as that alleged by the plaintiffs had been made between the master of the *Cruizer* and the master of the *Friesland*, it would be unenforceable and void by reason of the agreement which had already been entered into between the respective owners, and which neither of the respective masters had authority to vary. The master and crew of the *Cruizer* are the servants of her owners, and, by the necessity of the case and the nature of their employment, the master and crew are bound by the agreement made with the agents of the *Friesland* by the owners of the *Cruizer*, for their acquiescence will be assumed.

Crawford, in reply. As regards the *Cruizer*, there were three separate independent rights involved, namely, those of the owners, those of the master, and those of the crew. The owners could, no doubt, contract for themselves; but this did not oust their own right to salvage, as they only made a conditional agreement, and they could not bind the master and crew by a towage contract so as to deprive them of their right to salvage, for the acquiescence of the master and crew was

wanting: see *The Margery* (1), where the cases are referred to in argument.

Cur. adv. vult.

July 19. THE PRESIDENT (SIR F. H. JEUNE). The first question of fact is whether the master of the tug made an arrangement with the master of the *Friesland* that the service was to be considered a salvage service. I do not think that that is very material, because it was, in my opinion, a salvage service, though not of great or special difficulty; but I do not think there is evidence enough to shew that any such arrangement was in fact made. To my mind it is not fairly made out.

On the other hand, there can be no question on the pleadings that there was an agreement made between the owners of the tug and the representative of the owners of the ship in Liverpool that the services should be rendered upon towage terms, and therefore were not salvage but towage. On the evidence I should have had some doubt whether that contract was actually made out, because there was a difference in the evidence about it; and, having regard to some of the probabilities of the case, I think it would not have been easy to have said that the contract was made out. In the statement of claim, however, the fact of a contract is admitted, though it is said to have been conditional, and paragraph 7 states that "the owners of the *Cruizer* will contend that the said agreement never became binding upon them on the ground that the *Cruizer* proceeded to the assistance of the *Friesland* before the said agreement was made, and that the master of the *Cruizer* did agree with the master of the *Friesland* to receive remuneration on the basis of salvage before he had received any instructions from the owners of the *Cruizer* and before he knew that any such conditional agreement had been made." In the result, therefore, it may be assumed that there was an agreement; but it is said it was made conditional upon the *Cruizer* being still at Dunmore, and not having proceeded to the assistance of the *Friesland*, and subject to the master of the *Cruizer* not making any agreement

(1) [1902] P. 157, at p. 162.

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with the master of the *Friesland* for remuneration on the basis of salvage. I do not think there is evidence enough to shew that those conditions were made. Some phrase was used, no doubt, about the *Cruizer* rendering these services if she could get there, but that, to my mind, falls very far short of making an agreement upon the conditions alleged. I think it was conditional on the *Cruizer* being capable of rendering the services, because it is very natural that a condition of that kind should be put in. They did not intend to guarantee that the *Cruizer* was still in Dunmore Harbour. I think, therefore, that the agreement existed, but that there were no such conditions as are suggested.

The order of events appears to be that the *Cruizer* started independently of advice or orders to perform the service, whatever it was, and got up to the *Friesland*—very likely, I think, got hold of her—and then about that time or, as I think, a little after it, a bargain was made at Liverpool. I think, therefore, the bargain was made during the performance of the salvage service—the salvage service had commenced. Thus the state of things is that whilst the salvage service is in course of performance by the *Cruizer*, the owners, elsewhere, make a bargain with the owners of the *Friesland* that the service shall be upon towage and not upon salvage terms. That, I think, fairly binds the owners. They were sui juris, and I cannot see any reason why that agreement should not take effect as regards them. It may be said that they made it at Liverpool in ignorance of the facts, and that, therefore, the agreement is not binding. If it could be shewn they did make it in ignorance of the real facts of the case, thinking that the *Friesland* had nothing the matter with her, then I am not sure under those circumstances that the agreement would stand; but that cannot be said. They did know that the *Friesland* was lying there with her shaft broken. Therefore they must have known all the material facts as to the circumstances of the case, and I am unable to say that the owners are not bound by the agreement. I think they are.

Then comes another and more difficult question. It was

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argued before me that, even supposing the owners of the *Cruizer* were bound by the agreement, the master and crew have independent rights, and although they joined with the owners in this action, they can amend their pleadings. I thought at first there was little authority for that contention, but I find there is authority which, I think, settles this matter; the question being whether an owner can bind his master and crew without any acquiescence in fact on their part as to the reward to be paid for services. The effect of the authorities appears to me to be this, that before such a service is performed the owners have authority to bind the master and crew. On what principle that rests I am not very careful to inquire. It may be that it is to be put down to the principle that in the particular circumstances, if a contract is to be made it must be made by the owners without communication with the master and crew, because no communication can be made with them; and therefore it is just like a bargain made by the master ex necessitate, which binds the owners, in the particular circumstances of the case. That may be the principle which enables the owners to bind the master and crew for future services, though they in no way acquiesce. Again, that may not be the real principle. It may be that when the master enters into service there is an implied contract by which the owners can bind him. It can only apply, however, to ordinary services. Where there is something special, out of the course of a man's ordinary employment, I should be very slow to think that there could be any authority of that kind, and I am not sure whether all salvage would not be considered to be outside an ordinary agreement. Whatever be the principle, I think the authorities are pretty clear that as regards future services the owners can bind the master and crew by an agreement to which the master and crew are no parties, but I think it is otherwise as to past services. Here services had been done, or partly done, of a salvage kind, giving independent rights, and the owners cannot bargain away the vested rights of the master and crew by a bargain in which the master and crew do not acquiesce. That, I think, is the result of the various authorities upon this point.

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In the case of *The Britain* (1), decided by Dr. Lushington, the head-note runs: "In cases of salvage, the master of the salving vessel may bind his own interest, and the interest of his employers, by an agreement with the owner of the vessel saved as to the quantum of salvage to be paid, but such agreement will not be conclusive upon the rest of the crew if made without their sanction and concurrence." There the learned judge gave to the crew an award on the basis of their not being bound by the agreement which had been made by the master, and which professed to bind them; but it is to be observed that that was an agreement as regards services which had been performed. In the case of *The Sarah Jane* (2), also decided by Dr. Lushington, the material portion of the head-note is as follows: "Owners of vessels, which have received salvage assistance, cannot safely enter into a settlement of a salvage compensation, which includes the interests of all persons concerned in the salvage, without procuring a general release in the first instance." The principle is there laid down broadly, and in that case also the services had been already rendered. In *The Nasmyth* (3), decided by Butt J., the facts, as stated in the head-note, were that "An agreement was made between the masters of the *W.* and the *N.*, which was in need of assistance, that the *W.* should tow the *N.* to Queenstown for the sum of 200*l.* There was no evidence at the trial to shew that the master of the *W.* consulted the officers and crew as to the terms of the agreement. The service was duly performed, and subsequently thirteen of the officers and crew of the *W.* brought an action of salvage against the *N.* The defendants pleaded, inter alia, that they had tendered 200*l.* to the owners of the *W.*" There the learned judge upheld the agreement on the ground that when a fair salvage agreement had been made in a bonâ fide manner by the masters of the salving and the salved vessels, the officers and seamen of the salving ship ought not to bring an action of salvage. The plaintiffs, therefore, were ordered to pay the costs of the action, Butt J. observing that it was "a fair agreement made in a bonâ fide manner, and

(1) (1839) 1 Wm. Rob. 40. (2) (1843) 2 Wm. Rob. 110.
(3) (1885) 10 P. D. 41.

one by which the master of the *Wordsworth* had authority to bind his owners and crew." There the services were rendered after the agreement was made, and the learned judge held that the agreement was binding, not only upon the owners, but also upon the crew.

In *The Inchmaree* (1), Phillimore J., who has had great experience in Admiralty matters, decided that "Where the services of a salvor were discontinuous, and an amount was tendered and paid into court representing the sums agreed upon, by the master of the salving vessel, with the master of the salved vessel, as the reward to cover valuable services rendered prior to the agreement, as well as the successful services subsequently rendered," the tender must be rejected, and a salvage award made in respect of the services prior to the agreement, as the owner and crew of the salving vessel had acquired vested rights which the master of the salving vessel had no authority to bargain away, but that the amount fixed by the agreement must stand in respect of the subsequent services. So a line is there clearly drawn between prior and subsequent services, and the learned judge laid down that there is authority in the owner or master to bind with regard to future services, but not with regard to services already rendered.

The last case to which I need refer is that of *The Margery* (2), decided by Gorell Barnes J. and myself. In that case there was a very special arrangement made to bind all cases, and we held that that would not bind the master and crew unless the master and crew had acquiesced in it. The whole of that case turned upon whether they had acquiesced in the arrangement; and in the result we thought they had not and therefore were not bound. I think, therefore, the law is sufficiently clear. It only remains to apply it to the facts. Was this a discontinuous service in the sense that there was a discontinuance at the time the agreement between the owners was made, and did that agreement apply only to the future and not to what had happened in the past? I do not think so. It seems to me to be a continuous service in fact of which a substantial part had been performed before the agreement was made. As far as I can

(1) [1899] P. 111. (2) [1902] P. 157.

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make out, the agreement was made at the time when the tug had got out to the *Friesland* and probably had begun to render salvage services by trying to get, or having got, hold of her. At any rate, it seems to me that a substantial part of a continuous service had been performed, and the tug, in ignorance of the agreement, went on performing it as part of a continuous service. In those circumstances I think the master and crew had an independent right, apart from the agreement, to be paid for the salvage service which they rendered. Then I have to consider what is the value of that service. The total value of the *Friesland*, her cargo and freight, was 94,808*l*., and that is the strongest point in the case in favour of an award. The services, though salvage services, were of no great difficulty. The *Friesland* had broken her shaft, but I do not think that she was in any imminent peril. At the same time she was glad to get the services of a powerful tug, such as the *Cruizer* undoubtedly is. The danger to the tug was small, and the weather on the whole was fair. With the assistance of the Elder Brethren I have come to the conclusion that the total sum which it would have been proper to award had there been no agreement, but which I do not award having regard to the circumstances, is 1200*l*. I mention that figure only for the purpose of shewing why I think the proper sum to give to the master and crew is 400*l*.—150*l*. to the master and 250*l*. to the crew—with such costs as were necessarily incurred in proving the claim for salvage made by the master and crew.

Solicitors for plaintiffs: *Miller & Son, Liverpool.*

Solicitors for defendants: *Hill, Dickinson, Dickinson, Hill & Roberts, Liverpool.*

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Admiralty — Collision — Fog signals—Steam trawler — Regulations of 1884 *relating to Fishing Vessels, art.* 10 (*g*)—*Regulations for Preventing Collisions at Sea,* 1897, *art.* 15 (*a*).

The general provisions of art. 15 (*a*) of the Regulations for Preventing Collisions at Sea, 1897, do not override the special provisions of art. 10 (*g*) of the Regulations of 1884, which are still in force, and, therefore, a British steam trawler, when trawling in the sea off the coast of Europe north of Cape Finisterre, must, in fog, not make whistle signals, but "at intervals of not more than two minutes make a blast with her fog-horn and ring her bell alternately."

Observations on the necessity, with reference to fishing vessels, for the promulgation of regulations, relating to signals and lights, of an international character, and not limited in area.

ACTION OF DAMAGE BY COLLISION.

The plaintiffs were the owners of the *Anson*, and her master and crew proceeding for their personal effects. The defendants were the owners of the *London* and her freight.

The case is reported on the question of what are the proper signals to be made in foggy weather by a British steam trawler at work in the North Sea. (1)

The facts, so far as material, were shortly as follows:—

On June 5, 1904, about 2 A.M., the weather being foggy, the

(1) Art. 9 of the Regulations for Preventing Collisions at Sea, 1897, relating to fishing vessels, has not yet been promulgated; in the meantime art. 10 of the Regulations of 1884 remains in force, by which—

"The following portion of this article applies only to fishing vessels and boats in the sea off the coast of Europe, lying north of Cape Finisterre:—. . .

"(*g*) In fog, mist, or falling snow, a drift-net vessel attached to her nets, and a vessel when trawling, dredging, or fishing with any kind of drag-net, and a vessel employed in line-fishing with her lines out, shall at intervals of not more than two minutes make a blast with her fog-horn and ring her bell alternately."

Regulations for Preventing Collisions at Sea, 1897, art. 15:— . . . .

"A steam vessel shall be provided with an efficient whistle or siren, sounded by steam or some substitute for steam, so placed that the sound may not be intercepted by any obstruction, and with an efficient fog-horn, to be sounded by mechanical means, and also with an efficient bell. . . ."

"In fog . . . . (*a*) a steam vessel having way upon her shall sound, at intervals of not more than two minutes, a prolonged blast" on the whistle or siren of from four to six seconds' duration.

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wind light from N.E. with some sea from the same direction, the *Anson* of Hull—an iron screw trawler of 154 tons gross register with engines of fifty horse power nominal, and a crew of nine hands—was trawling in the North Sea about eighty miles to the eastward of the Spurn, on a course E. by compass and making about two knots, when the whistle of a steamship was suddenly heard, and then the loom of the vessel was seen close to, and broad on the starboard bow. Before an order to stop the engines could be obeyed the vessel struck the *Anson* a heavy blow amidships on the starboard side, doing such damage that the *Anson* sank. The vessel proved to be the *London*, a Danish screw steamship of 1475 tons gross register, with engines of 139 horse power nominal and a crew of eighteen hands, from Bremen to Grimsby in water ballast, on a course of W. b. N. ½ N., and making about three and a half knots.

According to the defence and counter-claim, "those on board the *London* heard a long blast of a steam whistle on the port side a long way off . . . . (and) some considerable time afterwards a single long blast of a steam whistle of a vessel which proved to be the *Anson* was heard on the port bow and apparently not far off. The engines of the *London* were immediately stopped and . . . . as no further signal was heard from the *Anson* the engines of the *London* were reversed full speed, and shortly afterwards a bright light on the *Anson* came into view distant about two lengths and being about two points on the port bow. The engines of the *London* were kept reversing, and her helm was put hard-a-port to keep her straight on her course; but the *Anson* whose green light had now come into sight came on," and the collision occurred.

The report of the arguments of counsel is restricted to the question of the sound signals for fog of a steam trawler.

Aspinall, K.C., Lauriston Batten, and *C. R. Dunlop*, for the plaintiffs. Admitting that as art. 9 of the Regulations for Preventing Collisions at Sea, 1897, has not yet been promulgated, art. 10 of the Regulations of 1884 remains in force; still sub-s. (*g*) of that article, by which in fog "a vessel when trawling . . . . shall at intervals of not more than two minutes

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make a blast with her fog-horn, and ring her bell alternately," only applies to sailing trawlers, and even then is limited to fishing vessels "off the coast," and does not apply to a trawler out in the North Sea over eighty miles to the eastward of the Spurn. The *Anson* was, therefore, as a steam trawler, complying with the rules—namely, art. 15 (*a*) of the Regulations of 1897, relating to steam vessels having way upon them, by sounding a prolonged blast on her whistle at intervals of not more than two minutes.

Robson, K.C., and *Balloch*, for the defendants. Steam trawlers were in use before the date of art. 10 of the Regulations of 1884: see *The Dunelm* (1); and, therefore, sub-s. (*g*) not being restricted to sailing trawlers must be taken to apply generally to trawlers, and there is no difficulty in a steam trawler complying with the rule there imposed, in respect of sound signals for fog, as by art. 15 of the Regulations of 1897 every steam vessel must be provided with a fog-horn and a bell. Secondly, the words "off the coast" are not limited in the way suggested by the plaintiffs, for the collision in the case of *The Orion* (2) took place eighty miles eastward of the Spurn lightship, and no question was raised as to art. 10 not being applicable. It is clear, therefore, that the *Anson* was not complying with the regulations, for she was not using either a fog-horn or a bell, and even in respect of the whistle the evidence shews that those in charge of her failed to sound it at intervals of not more than two minutes.

[*The Tweedsdale* (3) was referred to.]

THE PRESIDENT (SIR F. H. JEUNE). For the purposes of this case I think I must state what the rules with regard to sound signals in fog in the case of steam trawlers mean, though it is a matter upon which an opinion can be expressed only with hesitation, because it may well be that the practice of vessels does not altogether correspond to what, in my view, are the obligations imposed by the rule. I regret very much that the rules both as to signals and lights which have been

(1) (1884) 9 P. D. 164. (2) [1891] P. 307.
(3) (1889) 14 P. D. 164.

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made for the purposes of these fishing vessels are not expressed in quite clear and simple language. In a matter of this kind, and especially in the case of rules which are to affect a class of vessels which are obviously not manned by the same class of men as man vessels of greater size and value, it is of importance that such rules should be as clear as possible; and they should, I think, be international rules, so as to bind the vessels of other nations as well as our own; and it is desirable that they should extend not only to fishing vessels and boats when in the sea off the coast of Europe lying north of Cape Finisterre, but also to vessels navigating the coast of America. I say this in the hope that those in authority will see their way before long to make clear and efficient international rules on this important subject.

As the matter stands I must take the rules as they are, and I entertain no doubt that the obligations of sub-s. (*g*) of art. 10 of the Regulations of 1884, which are still in force, do apply to a steam vessel engaged in trawling. The words appear to me to be clear. [The learned judge read the article already set out, and continued:—] It is argued that the rule does not in terms apply to a steam vessel, but only to a sailing vessel when engaged in trawling. I do not think that is the correct construction, for there is nothing in the language that I can see limiting the words to sailing vessels. It is suggested that the use of the word fog-horn shews that sailing vessels only are meant, but by art. 15 of the Regulations of 1897 a steam vessel must be provided, not only with an efficient whistle, but "with an efficient fog-horn" and "also with an efficient bell." Then it is suggested that sub-s. (*a*) of art. 15 overrides the provisions of sub-s. (*g*) of the previous article. The words are: "A steam vessel having way upon her, shall sound, at intervals of not more than two minutes, a prolonged blast." It does not appear to me that that overrides the special provision contained in sub-s. (*g*), as regards steam vessels engaged in trawling, because the general words of the later article are not, I think, intended to override the special words of sub-s. (*g*). It is a case to which the maxim "Generalia specialibus non derogant" appears to me to be applicable. I am, therefore, compelled to say that I

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think a steam trawler under way, engaged in trawling, in fog, must sound her fog-horn and ring her bell alternately at intervals of not more than two minutes. What exactly that means I am not quite sure—that is to say, I am not clear as to the meaning of the word "alternately" with reference to the interval between the sounding of the fog-horn and the bell; but in this case it is not necessary for me to determine that point, because the evidence shews that the *Anson* did not ring a bell, and even supposing I held, which I do not, that the bell need not be used, under the circumstances it is difficult to say, on the evidence, that the *Anson* was complying with the rule. She was employing a whistle, and not a fog-horn, which had, I daresay, something in the way of a trumpet mouth. It is quite clear that she was not acting in accordance with the rule. She was not ringing a bell, and according to her own story she was not whistling every two minutes, because although her witnesses managed to get pretty near to it by talking of two and a half minutes, and so on, it is clear to me there was no whistling every two minutes. I therefore think that the *Anson* must be held to have violated the rule from whatever aspect you look at it. It may be said that in this case it is immaterial because the *London* did not hear any whistle from the *Anson* until a late period, and then only one; but I am not impressed by that, because if a vessel is not whistling according to the rule it is difficult for her to argue that "it did not matter, because even if I had you would not have heard it." No one can say that. When a whistle was heard in fact—when other whistles were heard in fact—I am not at all prepared to say that if the *Anson* had been whistling regularly every two minutes, and still more if she had been ringing her bell, the *London* would not have had at any rate opportunity of hearing more than she did, with the result that her action might have been different. I do not mean to say that I think the rule which requires a fog-horn to be sounded and a bell rung alternately is a good rule; because it appears to me that the mixing of two different signals—one being the signal for a vessel under way and the other for a vessel at anchor—is not wise; but that is not material in this case, for all I have to

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consider is whether, if a vessel does not perform her obligations under that rule, she can say it is immaterial whether she did or did not, because nothing could have happened if she had which would have tended to prevent this collision. If the *Anson* had obeyed this rule I think it might have been the case that the *London* would have had earlier information of the *Anson*, and would have been enabled to act accordingly. The *Anson* must, therefore, be held to blame for not obeying the rule as to sound signalling in fog.

Now as to the *London*. I have had to consider her case carefully in order to see whether any charge is made out against her. The first allegation against her is that she did not stop at the whistle, on hearing which she ought to have stopped. I think from this point of view it is immaterial whether the whistle at which she did not stop was the whistle of the *Anson* or whether it was not, because it is the clear duty of a vessel which hears a whistle forward of her beam, in a position which is not ascertained, to stop her engines and then proceed with caution. The question is whether she did that or not. According to the account of her master there were three whistles. The first whistle was a little forward of the starboard beam, and he says he rung to stop the engines at once, and did not put the engines on ahead again until the vessel had passed and they saw that vessel. Then, after that, the vessel's engines were rung to half speed. Then whistle No. 2 was heard—it may or may not have been the whistle of the *Anson*—but the master of the *London* says he heard the whistle abaft the beam. He admits he did not stop the engines for that whistle, and if his story be true there was no obligation to do so, because he heard it abaft the beam. There was then an interval of six minutes, and then a whistle was heard on the port bow which was undoubtedly the whistle of the *Anson*, and for that he says he stopped at once, and after a short time reversed. So the only whistle with regard to which fault can be found is the second whistle, which he says was abaft the beam. I have very great difficulty in saying that the rule was violated in that respect, because although it is immaterial whether it was the whistle of the *Anson* or not, still, if it was

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the *Anson's* whistle it was abaft the beam and there would be no obligation on him to stop. I cannot, therefore, think that the *London* ought to be held to blame for any failure to stop her engines. Then comes the question of speed. [The learned judge dealt with the evidence on the question of speed, and came to the conclusion that it was not excessive.]

That, I think, exhausts the case. I do not think anything turns upon the helm action of the vessel. I agree that in regard to large vessels like the *London* it is not desirable to have a look-out only on the bridge, not so much because the bridge may not be a good place from which both to see and hear, but because it seems to me important that the man on the look-out should be, as it were, isolated in the front part of the vessel, engaged in looking out, and nothing else; but I cannot think that there was any real effect produced in this case by that inefficient look-out, if it was inefficient. The *Anson* was seen as soon as she could be seen, having regard to the fog, and as regards hearing it cannot be said that any bad look-out produced any inappreciation of what the *Anson* was doing, because as the *Anson* was not giving proper signals it is impossible to say whether, if given, they would have been heard. Therefore, I think bad look-out is not a matter upon which the case should be allowed to turn. The result is that the *Anson* must be held alone to blame.

Solicitors for plaintiffs: *Pritchard & Sons, for A. M. Jackson & Co., Hull.*

Solicitors for defendants: *Thomas Cooper & Co.*

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May 13; *June* 1, 15.

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Divorce—Practice—Garnishee Proceedings—Choses in Action—Debts owing or accruing—Attachment before date when Debts are payable—Orders for Wife's Support and Costs—Official Appointments of Respondent—Fees earned—Assignment defeating individual Creditor—13 Eliz. c. 5—Payment by Garnishee after Notice of Order Nisi—Cheque—Duty to stop Payment—Garnishee Orders Nisi made absolute.

The principles involved in garnishee proceedings arising out of decrees and orders in matrimonial suits examined and considered.

Garnishee orders nisi in respect of sums due or accruing due to the respondent, a medical man, on contracts in respect of his position as public vaccinator and as registrar of births and deaths, made absolute for payment of sums due to the petitioner (his wife) under orders of the Divorce Court for her support and for costs of proceedings in that Court.

A public vaccinator earned fees under a contract which specified that he should perform certain ministerial acts before becoming entitled to payment of his fees:—

Held, that the fees were debts accruing due so as to be attachable as soon as the work was performed, even though the contract specified a future date for actual payment.

The Registration Acts prescribe that the accounts of registrars are to be vouched by the superintendent registrar of births and deaths:—

Held, that fees earned by a registrar in respect of births and deaths actually registered were debts accruing due so as to be attachable before the accounts had been vouched or time for payment had arrived.

Although at the date of garnishee proceedings an assignment by a judgment debtor may not have been executed or even assented to by the assignee, the assignment may, nevertheless, be valid against the claims of the judgment creditor, provided that the assignee afterwards assents to and executes the deed of assignment, whereupon the validity of the deed relates back to the date of its execution by the assignor.

An assignment of choses in action, since these became subject to attachment by the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), s. 60 et seq., may be void under the statute of Elizabeth (13 Eliz. c. 5), as tending to defeat, hinder, or delay creditors.

If one particular creditor only is, in effect, though not necessarily intentionally, defeated, hindered, or delayed by an assignment executed by the judgment debtor, such assignment may be void under the Statute of Elizabeth as tending to defeat, hinder, or delay creditors.

If a garnishee has already made payment to the judgment debtor by cheque before notice of a garnishee order nisi, he is, upon receiving notice, under no legal obligation to stop payment of the cheque.

THESE were applications to make absolute garnishee orders nisi obtained by the petitioner in respect of orders for

an allowance for her support and for costs in matrimonial proceedings.

The petitioner, Elizabeth Edmunds (now the judgment creditor), brought a suit for restitution of conjugal rights against the respondent, Percy James Edmunds (now the judgment debtor), and, consequent thereon, an order was made on January 30, 1903, under the Matrimonial Causes Act, 1884 (47 & 48 Vict. c. 68), s. 2, for the payment by the respondent to the petitioner of the monthly sum of 12*l.* 10*s.* This order was still in force at the date of the commencement of the present proceedings, and no steps had been taken under s. 4 of the same Act for its variation. Subsequently to the date of this order, namely, on February 13, 1903, the petitioner instituted against the respondent a suit for dissolution of marriage, in which a decree nisi was pronounced on June 9, 1903.

This decree had not been made absolute.

On March 5, 1904, certain moneys then in the bank of the respondent were attached at the instance of the petitioner by an order, made in the suit for restitution of conjugal rights, in part discharge of the order for the payment of the monthly sum of 12*l.* 10*s.*, leaving due up to the previous February a balance of 10*l.* 6*s.* 2*d.* on account of arrears under the order for the payment of the said monthly allowance. At that time and at the date of the present applications the respondent held, amongst other appointments, that of public vaccinator under the guardians of the Westminster Union, and also that of registrar of births and deaths.

The material circumstances in connection with the office of registrar of births and deaths are hereinafter referred to. By the terms of his contract of appointment as public vaccinator the respondent agreed to attend and vaccinate and keep a register of vaccinations, and the guardians agreed to pay to the respondent, his executors or administrators, within one calendar month after the usual quarter-days, the sum of 1*s.* 6*d.* for each vaccination, but he was to be paid nothing for any case not duly registered according to the contract; and the contract further provided that the respondent "shall not be entitled to be paid his account from time to time to be rendered of fees for

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cases of vaccination unless he shall have punctually attended at the time and place for the purposes of vaccination as stated in the schedule hereto, and also shall have duly and punctually registered and certified in relation to vaccination and transmitted to the vaccination officers a certificate of successful vaccination in respect of every person who shall have applied to him for such purpose during the period to which his account or claim for fees from time to time rendered to the said guardians shall relate, and shall have fulfilled all and singular the requirements of the statutes relating to vaccination and the regulations of the Lords of the Council and the Local Government Board."

On March 8, 1904, the respondent executed a deed by which, after reciting that he owed 60*l.* for assessed taxes which he was unable to pay and that the decree nisi in the suit for dissolution of marriage had not been made absolute, and that his bank balance had been attached (by order of March 5) and that he was in need of funds to carry on his business, it was witnessed that in consideration of certain advances therein mentioned he (the respondent) thereby assigned, as mortgagor, to his father (the present claimant), as mortgagee (inter alia), all his salary and fees then due and from time to time becoming due as public vaccinator and registrar of births and deaths as aforesaid. Although the assignment was executed by the respondent on March 8, it was not executed by his father, who was then absent from England, till April 11. In close proximity in point of time to the execution of this document by the respondent some material letters passed between the clerk to the guardians of the Westminster Union and the solicitor who was acting for the respondent and his father. One of these letters, giving formal notice to the guardians of the assignment referred to, specifically referred to the necessity for meeting the temporary financial difficulties of the respondent. On the date of this letter the assignment was on the point of execution. About March 8 also the same solicitor, then acting not only for the respondent and for his father, but also for the guardians, wrote a letter to the father of the respondent stating that the respondent was executing the assignment "as an escrow conditionally on its being approved of when you return." The following expres-

sion occurred in this letter: "When Mrs. Edmunds is forced to realize that she has nothing left but to proceed in bankruptcy, it may be the means of her coming to some settlement whereby she may take some reasonable sum as an allowance."

In a letter dated April 12, 1904, the father of the respondent clearly assented to the deed, which he had then executed. Meanwhile, on March 22, an order was made in the divorce suit that the respondent should within seven days pay 62*l.* 8*s.* 2*d.*, the costs of the petitioner in that suit; and, on March 23, that order was served on the respondent. On March 24 the first garnishee order nisi, now in question, was made at the instance of the petitioner, and by it all debts owing or accruing due from the guardians to the respondent were attached to satisfy the amount due from the respondent to the petitioner under the order of January 30, 1903, being the order for the payment of 12*l.* 10*s.* monthly, on which the sum of 22*l.* 16*s.* 2*d.* then remained unpaid—that is to say, that, in addition to the sum of 10*l.* 6*s.* 2*d.* previously mentioned, a further monthly sum of 12*l.* 10*s.* was then due and unpaid. At the date of this order the sum of 38*l.* 18*s.* 6*d.* had already been earned by the respondent for vaccination fees; and, in addition, there was another sum of 7*l.* 8*s.* 1*d.* due to him for registration of births and deaths up to March 24, making a total amount attachable (as claimed by the petitioner) of 46*l.* 6*s.* 7*d.*

On April 16 a summons to make absolute the garnishee order nisi was adjourned till April 23; and, as the question to be decided turned on points of law, it was agreed that it should be adjourned into open Court for argument and decision, without formally directing an issue. On April 8 a cheque for 38*l.* 18*s.* 6*d.* was drawn in favour of the respondent by the guardians, and this was indorsed by him about April 18 to the solicitors acting on behalf of his father, and was paid on April 29. On April 22 a cheque for the sum of 8*l.* 3*s.* 1*d.*, payable to the respondent for registration fees, and representing the previously mentioned sum of 7*l.* 8*s.* 1*d.*, together with a further sum of 15*s.* in respect of the further period between March 24 and March 31, was indorsed by him and handed on the same day to the solicitors

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acting for his father, and the same was also duly paid on April 29.

In the meantime—that is to say, on April 26—the second garnishee order nisi now in question was obtained, partly for a further monthly sum then due, and partly for the costs, amounting to 62*l.* 8*s.* 2*d.*, payable under the order of March 22, the total amounting to 74*l.* 18*s.* 2*d.* At that time there was, assuming the sum of 22*l.* 16*s.* 2*d.* (affected by the first garnishee order) to be deducted from the sum of 46*l.* 6*s.* 7*d.* already due to the respondent, a balance still coming to him of 23*l.* 10*s.* 5*d.* out of the 46*l.* 6*s.* 7*d.*

On application to make absolute this second garnishee order nisi it was adjourned to the judge in chambers, and came on before him on April 30, when the consideration of both orders in open Court was postponed till May 12. In addition, there was now further due to the respondent, on the vaccination contract, the sum of 13*l.* 18*s.* (although it was contended on his behalf that this sum was not payable till one month after June 24), and 2*l.* 9*s.* for registration fees (which, however, it was contended were not payable till June 30), in addition to 15*s.* for registration fees earned between March 24 and March 31—making in all 40*l.* 12*s.* 5*d.*

On May 13 evidence was tendered on behalf of the claimant (the respondent's father) by the claimant himself, who admitted in cross-examination that he took the assignment to prevent his son's wife from issuing execution or from breaking up his son's home; and evidence was also given by his solicitor, who admitted that the effect of the deed, though not its object, might be to deprive the petitioner of her allowance.

W. Ellis Hill, on behalf of the garnishees and the claimant and also for the respondent. The affidavit on which the order of March 24 proceeded is insufficient; it does not shew a present debt. It merely deposes that the garnishees are, or will be, indebted: *Richardson* v. *Elmit.* (1) Secondly, salary is not due till it is payable—that is to say, till pay-day comes: *Hall* v. *Pritchett.* (2)

(1) (1876) 2 C. P. D. 9. (2) (1877) 3 Q. B. D. 215.

[GORELL BARNES J. referred to *Tapp* v. *Jones* (1) and *Jones* v. *Thompson*. (2)]

The true test is whether anything remains to be done by the judgment debtor as a condition precedent to payment: *Howell* v. *Metropolitan District Ry. Co.* (3).

[GORELL BARNES J. referred to *Barnett* v. *Eastman* (4)—a case in which it was decided that rent could not be attached, as a debt accruing due, before it was payable.]

A present debt may only be payable in future and yet be attachable; but at all events there must be an existing debt: *Webb* v. *Stenton*. (5) The judgment debtor is, by his contract, to receive nothing unless he has punctually attended and duly registered the certificates prescribed. He might, on or before March 25, make default under his contract, and, in that event, nothing would be payable to him, and there would be no debt to attach. His emoluments as registrar of births and deaths are regulated by s. 29 of the Registration Act, 1836 (6 & 7 Will. 4, c. 86), and it is a condition precedent to payment that the superintendent registrar should vouch his accounts. As to vaccination fees, therefore, the amount of 38*l.* 18*s.* 6*d.* was not due till March 25, after which there was a month to run before payment; whilst, as to registration fees, the amount of 7*l.* 8*s.* 1*d.* though earned, required verification by the superintendent registrar. The result is that nothing was due at the date of the first order. These sums may have been due at the date of the second garnishee order (April 26), but what was due had been already paid; whilst the further sums of 13*l.* 18*s.* for vaccination fees and 2*l.* 9*s.* for registration, which it is contended were attachable at that date, were not payable till July 24 and June 30 respectively. Furthermore, none of these sums, even if due or payable, were receivable by the judgment debtor, all of them having been effectively assigned. As to the assignment, in the first place it cannot be challenged in garnishee proceedings. The assignee takes the same rights as the judgment debtor had; and, even if the assignment be void as against

(1) (1875) L. R. 10 Q. B. 591.
(2) (1858) 1 E. B. & E. 63.
(3) (1881) 19 Ch. D. 508.
(4) (1898) 67 L. J. (Q.B.) 517.
(5) (1883) 11 Q. B. D. 518.

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creditors, it is valid inter partes: *Cole* v. *Eley*. (1) Secondly, it is not void against creditors under the Statute of Elizabeth, because it defeats one particular creditor only: *Wood* v. *Dixie*. (2) The result of the evidence was that it was not the object of the assignment to defeat the judgment creditor, though that might possibly be its effect.

June 1. *J. R. Atkin*, for the petitioner (the judgment creditor). Objection to the sufficiency of the affidavit is cured by the appearance on the summons.

[GORELL BARNES J. I am in your favour on that point.]

As to the point that there is no debt accruing, the judgment creditor relies on *Tapp* v. *Jones* (3) and *Sparks* v. *Younge*. (4) There is clearly no condition precedent to the payment of the registration fees. As to the first garnishee summons, two issues are in effect raised: the first, on behalf of the guardians, that nothing was due at the date of the summons (which embraces the points raised both on the vaccination contract and the Registration Act); and, secondly, on behalf of the father of the judgment debtor as well as of the guardians, that the father of the judgment debtor, and not the judgment debtor himself, was entitled by reason of the assignment. On the first summons there can be no claim by the father, because the deed was not executed by him till April 11.

On March 8 the deed was executed by the judgment debtor only; there was, therefore, no contract till April 11. There was no valid assignment on March 24, and, moreover, no notice of the assignment was then given.

[GORELL BARNES J. As between the parties to the assignment, would it not be good without notice?]

The true test is this: Was there on March 24 an effective assignment of choses in action? There must be valuable consideration, and at that date there was none.

[GORELL BARNES J. Why should not the assent of the father have a retrospective operation, so as to validate the assignment?]

(1) [1894] 2 Q. B. 180.
(2) (1845) 7 Q. B. 892.
(3) L. R. 10 Q. B. 591.
(4) (1858) 8 Ir. C. L. 251.

The rights of the judgment creditor on March 24 cannot be adversely affected by what occurred on April 11. There could be no binding contract until the assent of the father was actually given.

The next point arises on the statute of Elizabeth (13 Eliz. c. 5). Since the passing of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), ss. 60 et seq., choses in action are subject to attachment: May on Fraudulent Conveyances, ed. 1887, p. 33; hence an assignment of a chose in action may now be fraudulent. The correspondence in this case, coupled with the action of the solicitor in giving notice to the guardians before his client, the claimant, had executed the deed, shews that the assignment was in fraud of the judgment creditor. The case of *In re Maddever; Three Towns Banking Co.* v. *Maddever* (1), in which, as in the present instance, only one creditor was in fact affected, disposes of *Wood* v. *Dixie* (2), which, moreover, is distinguishable from the present case, as it was an assignment for full value.

In *Twyne's Case* (3) only one creditor appears to have been actually defeated or delayed.

The vaccination fees, amounting to 38*l.* 18*s.* 6*d.*, exceeded the total amount which it was sought to attach here under the first garnishee summons, and they were earned before March 24. At the date of the second summons there was, at all events, a sum of 40*l.* 12*s.* 5*d.* due from the guardians to the judgment debtor.

On the true construction of the vaccination contract there is no condition precedent to obstruct the receipt by the judgment debtor of moneys clearly earned by him. He had clearly earned the money he purported to assign.

In the cases relied on by the other side there was no debitum in præsenti.

The debts which the cheques for 38*l.* 18*s.* 6*d.* and 8*l.* 3*s.* 1*d.*, drawn by the guardians, represented were only accruing due; and therefore after the order the guardians could not properly pay those amounts, and they should have stopped payment of

(1) (1884) 27 Ch. D. 523. (2) 7 Q. B. 892.
(3) (1601) 3 Co. 80; 1 Sm. L. C. (ed. 1903) 1.

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the cheques: *Rogers* v. *Whiteley*. (1) *Cole* v. *Eley* (2) is not an authority for the proposition that, because the judgment creditor takes garnishee proceedings, she loses any advantage that the statute of Elizabeth might give her. The judgment creditor is the very person to be protected by the operation of the statute.

W. Ellis Hill, in reply, referred to *Holmes* v. *Millage*. (3) The cheque drawn by the guardians was payment by them, subject to the cheque being duly honoured; and after it was handed over there was no debt owing or accruing from them to the judgment debtor: *Elwell* v. *Jackson*. (4) There was no duty imposed on the guardians, on being served with the garnishee order nisi, to stop payment of a cheque already given: *Ex parte Richdale*. (5)

Cur. adv. vult.

June 15. GORELL BARNES J. (after referring to *Whittaker* v. *Whittaker* (6) as an instance of garnishee proceedings in a matrimonial suit). The facts are extremely complicated, and the position gives rise to some exceedingly difficult points.

A mass of cases were cited, but I do not propose to refer to many of them now. It is sufficient that I should endeavour to indicate the principles involved in the authorities which have led me to arrive at a conclusion in this matter.

The first point raised was that none of the sums in question were debts due or accruing due from the garnishee to the respondent—as to the vaccination fees, because, though earned, they were not yet payable in any sense that would make them attachable—in other words, that they were not owing or accruing.

This point rested on the contract itself, which it is necessary to examine with some care. It provides in the first place that the respondent shall attend by himself, or by some legally qualified substitute, at the times and places mentioned in the schedule, and "that he will then and there duly, and according to the requirements of the law, vaccinate every person resident

(1) [1892] A. C. 118.
(2) [1894] 2 Q. B. 180.
(3) [1893] 1 Q. B. 551.
(4) (1884) 1 Cab. & E. 362.
(5) (1882) 19 Ch. D. 409.
(6) (1881) 7 P. D. 15.

in the district who shall apply to or be brought to him for the purpose of being vaccinated, and will do and perform all such acts and things as to the best of his judgment and in accordance with such requirements shall seem necessary for the purpose of causing such vaccination to be successfully terminated; and will in like manner vaccinate any child whom any relieving officer of the said union shall in writing refer to him for vaccination; and will attend at the times and places mentioned in the schedule to inspect the results of such vaccination in the persons so vaccinated, and will duly inspect such persons accordingly, and do such acts and give such directions and otherwise treat the cases as upon such inspection shall appear to him to be necessary; and will keep a book to be termed 'The Vaccination Register,' to be provided for him by the said guardians, and will as soon as practicable after he shall have vaccinated any person to whom this contract shall apply, and as soon as practicable after he shall have inspected the results of the vaccination of such person, make the entries respectively applicable to the vaccination and the inspection of the results described in the form set forth in the schedule . . . . and will on the day next before the first ordinary meeting of the said guardians, in every quarter of the year, deliver or cause to be delivered to their clerk the book in which he shall have made such entries during the interval preceding such meeting." The respondent is, therefore, to do his work under the contract, and then vouch it.

The guardians then agree "to pay to him, his executors or administrators, within one month after Lady Day, Midsummer Day, Michaelmas Day, and Christmas Day respectively, during the subsistence of the contract, and within one month after its termination, for every person to whom this contract shall apply . . . . the sum of 1*s.* 6*d.* . . . . And it is hereby mutually agreed between the parties hereto, that no sum of money shall be paid to the said Percy James Edmunds in respect of any person whose name, together with the other particulars relating to the case, shall not be duly entered in the said register, except in the case of any omission which shall be explained to the satisfaction of the said guardians."

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Then follows a provision that the contract may be put an end to by either of the parties on giving twenty-eight days' notice. And the last clause is in these terms: "Provided always that the said Percy James Edmunds shall not be entitled to be paid his account from time to time to be rendered of fees for cases of vaccination, unless he shall have punctually attended at the time and place for the purposes of vaccination, as stated in the schedule hereto, and also shall have duly and punctually registered and certified in relation to vaccination and transmitted to the vaccination officers a certificate of successful vaccination in respect of every person who shall have applied to him for such purpose during the period to which his account or claim for fees from time to time rendered to the said guardians shall relate, and shall have fulfilled all and singular the requirements of the statutes relating to vaccination and the regulations of the Lords of the Council and the Local Government Board."

In this case all the entries have been properly made and all the amounts properly earned by the respondent; but the two opposing contentions on the principal clause of the contract are, on the part of the petitioner, that the clause is to be read distributively—that is to say, that for each fee in respect of which the respondent does the work and successfully vaccinates a patient he is to be paid, and that if he did not do all that was necessary under the terms of the contract in respect of some subsequent fees, this would not forfeit his right to those fees which he had properly earned and registered; on the other hand, on behalf of the respondent, it was contended that the clause was not to be read distributively, and that if the respondent failed to attend punctually he would not be entitled to payment of any fees previously earned. In other words, is the respondent entitled to payment of any fees if he should make a failure in respect of one? My view is that the clause in question, and, so far as may be necessary, any other clause in the contract, is to be read distributively.

I cannot regard it as a reasonable interpretation of this contract to say that if all the work has been properly done, certified, and entered up to March 24, for instance, and if the

respondent failed to attend punctually on March 25, that everything he had effectually done up to March 24 is to be treated as wiped out. The effect of my decision on this point is that the amount of 38*l.* 18*s.* 6*d.* was effectually earned for fees under this contract up to March 24, and that nothing which might happen afterwards could prevent that money becoming payable; and that although it was not to be payable, according to the terms of the contract, until one calendar month after Lady Day, it was, within the meaning of the garnishee order and the rules by analogy to which we act, a debt due or accruing due. The period of one month has now elapsed, and the cheque was paid on April 29.

If authority be needed for the proposition that money can be attached, although not actually payable, it is to be found in *Tapp* v. *Jones* (1), and in the Irish case of *Sparks* v. *Younge*. (2) A passage in the judgment in the Irish case (3) answers the further point that the earning of the money might be defeated.

I have now disposed of one of the principal points in the case, and it is one which applies to both sets of moneys due, with this difference, that under the contract and under the statute the smaller amounts are not payable until July 24 and June 30 respectively. But this only involves a question whether the order should be suspended till those dates.

I now come to the question of the registration fees. The point taken with respect to these fees arises under the Registration Act of 1836 (6 & 7 Will. 4, c. 86), s. 29 (4), and the contention put forward was that there was no verification of the signature. On the other side it was said that this was mere machinery, and according to my view the moneys were accruing, although not payable till afterwards. Any other construction, it seems to me, would prevent the respondent from being actually entitled to get his money at all for what

(1) L. R. 10 Q. B. 591.

(2) 8 Ir. C. L. 251.

(3) 8 Ir. C. L. at p. 259.

(4) Sect. 29 is as follows: "And be it enacted that every registrar shall make out an account four times in every year of the number of births and deaths which he shall have registered since the last quarterly account, and the superintendent registrar shall verify and sign the same."

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he had done, unless he got the signature verified; whereas the fact is that he has actually earned this money, although he cannot obtain payment till he gets his vouchers through. Upon this first of the remaining points I am, therefore, in favour of the petitioner.

The next point is probably more difficult to determine, because it is necessary to go back to the days of Elizabeth to ascertain where we stand. It is said on behalf of the respondent that the deed which purports to assign all the fees was a valid assignment to the respondent's father, and prevents the judgment debtor from getting at the money at all. But, on behalf of the petitioner, the assignment is said to be bad, because it was not executed by the respondent's father till April 11, and did not, therefore, become a complete deed till then.

The respondent's answer to that was that it was executed by the respondent as an escrow before the date of the garnishee order and was assented to by letter, and that the complete and effective assent given by the respondent's father on April 11, when he signed the deed, reflected back. The question, then, seems to be: When did the deed of assignment become operative as against the mortgagor? In my judgment it operated from the time of its execution by the mortgagor. For this we have to go back to Williams on the Law of Real Property, ed. 1901, p. 151. A fortiori, it would be valid against the second order.

Upon this point, therefore, I find for the respondent's father (the claimant).

There remained, then, the further point, whether the assignment was bad, under the provisions of the statute of Elizabeth, as having been made in fraud of creditors. There seems very little doubt that in former days the deed would have been good and would have barred the claims to these moneys, which are choses in action, and until garnished I do not see how they could have been got at by any process of effective execution. If authority be wanted for this, it will be found in *Norcutt* v. *Dodd*. (1)

(1) (1841) Cr. & Ph. 100.

The reason for that judgment was that, as long as the debtor was alive and solvent, the creditors could not get at his choses in action; but, if the debtor became bankrupt or died, the debts due to him could be got at. Nowadays, since 1854, the position is entirely changed. Debts can now be got at by attachment, and choses in action can be made available for the benefit of creditors. Therefore any deed defeating attachment of them may now come within the purview of the statute of Elizabeth. There is no specific authority that I can find, but I think that in May's book on Fraudulent Conveyances, ed. 1887, p. 33, debts are now treated upon the same footing as property which, in former times, would have come under the statute of Elizabeth.

Now comes the question: Was this deed of assignment executed for the purpose of defeating or delaying the creditor, and was it so void under the statute; or, on the other hand, was it a deed not intended to have that effect, though it might, in fact, produce that result? It was not, according to the solicitor, the object of the deed to defeat the particular creditor, though it might have that result.

Counsel for the respondent relied on *Wood* v. *Dixie* (1) as an authority that the deed may be good though the intent may be to defeat a particular creditor. But in *In re Maddever* (2), cited by counsel for the petitioner, there is a passage which seems to deal with the whole question that is necessary to be considered on this point. In that case North J., adopting the language of Kindersley V.-C., in an earlier case, says: "The principle now established is this. The language of the Act being, that any conveyance of property is void against creditors if it is made with intent to defeat, hinder, or delay creditors, the Court is to decide in each particular case whether, on all the circumstances, it can come to the conclusion that the intention of the settlor, in making the settlement, was to defeat, hinder, or delay his creditors." And North J. continues: "Now, this matter had been pending for a long time, but is brought to a focus just at the time when this particular demand was made. That the effect of it was to prevent the

(1) 7 Q. B. 892. (2) 27 Ch. D. 523, 526.

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creditors being paid I cannot have any doubt, and it appears also—and *Freeman* v. *Pope* (1) is an authority for that, if necessary—that a person must be taken to intend what is the natural consequence of his acts. Therefore, although there was no such intention, still, if I saw that the necessary effect of the deed was to defeat or delay creditors, I must see in the execution of the deed an intention to do so." Although in the case cited other creditors, if any, are formally taken note of in the judgment as reported, it appears, in fact, that there was only one particular creditor delayed or hindered. One must remember in the present case that the deed recites that the petitioner had garnished accounts in the bank and the deed was entered into at the particular time when these claims were being pressed upon the respondent. That is the strongest case cited by Mr. Atkin. The case of *Wood* v. *Dixie* (2), as far as one can judge from the report, was a conveyance of a house and furniture in respect of which, it seems to me, full value was given.

Before deciding this important point, one must ascertain and determine as far as possible what was in the minds of everybody connected with the transaction.

The letter of the solicitor contemplates the object and effect of what was done, which, in my view, was to defeat this particular creditor (the wife of the judgment debtor), the petitioner in the divorce proceedings. I am, therefore, of opinion that the deed is bad as against creditors.

It was urged by Mr. Hill that the judgment creditor could take no more rights under the deed than the judgment debtor had, and he relied on the case of *Cole* v. *Eley* (3) and the judgments therein; but in my opinion this is not in point where the rights of third parties are affected at the time of the assignment, and in my judgment the deed can be challenged by the judgment creditor in these proceedings.

The question remains as to the validity of the payments made. It was contended by Mr. Hill that the cheques for 38*l*. 18*s*. 6*d*. and 8*l*. 3*s*. 1*d*. were good payments by the guardians,

(1) (1870) L. R. 5 Ch. 538. (2) 7 Q. B. 892.
(3) [1894] 2 Q. B. 180.

and were properly paid and discharged their debt, and he relied on the case of *Elwell* v. *Jackson*. (1) I am, however, of opinion, on the authority of *Rogers* v. *Whiteley* (2), that after the first garnishee order the guardians could not properly pay at all, and, moreover, part of the moneys for which the cheques were given is actually payable under that order.

The result is that the petitioner (the judgment creditor) is entitled to succeed.

There must be an order in the usual form, on the first summons, for payment by the garnishees of 22*l*. 16*s*. 2*d*., and, on the second summons, for payment by the garnishees of 40*l*. 2*s*. 5*d*., which is partly due and partly accruing; as to 23*l*. 0*s*. 5*d*., part thereof, forthwith; and, similarly, as to 15*s*.; and as to 13*l*. 18*s*. in one month from June 24.

The further sum of 2*l*. 9*s*. is not yet due, but the application can be treated as made nunc pro tunc in respect thereof; and I order, accordingly, that it be paid when due.

Judgment for the petitioner (the judgment creditor), with costs against the respondent (the judgment debtor), and against the claimant, and against the garnishees.

Stay of execution pending appeal.

Solicitor for petitioner: *J. Morley.*

Solicitor for respondent and his father (the claimant): *W. J. Fraser.*

Solicitor for the garnishees: *C. E. W. Fraser.*

(1) 1 Cab. & E. 362.

(2) [1892] A. C. 118.

H. D. G.

1904
June 15.

EVANS *v.* EVANS AND BLYTH.

Divorce—Variation of Settlement—Hearing of Issue as to Legitimacy of Child—Proceeding not instituted in consequence of Adultery—Co-respondent in Divorce Suit—Competent and compellable Witness on Issue as to Status of Child.

Upon the hearing of an issue, which had been directed for the purpose of determining the status of a child born of the respondent during wedlock, the co-respondent in the former proceedings was called as a witness by the petitioner, and a question was put to him as to adultery between him and the respondent:—

Held, that he was bound to answer the question.

THIS was the hearing of an issue directed to be heard for the purpose of determining the status of a child.

The facts and circumstances under which the issue was directed are reported ante, p. 274.

Barnard and *Lawless*, for the petitioner. This is not a "proceeding instituted in consequence of adultery" within the meaning of the Evidence Amendment Act, 1869. The witness is bound to answer any question as to whether he has committed adultery with Mrs. Evans, the mother of the child.

Rawlinson, K.C., and *Willock*, for the infant, contra, referred to *Redfern* v. *Redfern* (1), *Harvey* v. *Lovekin, otherwise Harvey* (2), *Brownsword* v. *Edwards* (3), *Chetwynd* v. *Lindon* (4), Stephen's Digest of the Law of Evidence, 6th ed. art. 129, p. 147; *Mordaunt* v. *Moncreiffe* (5), and the Witnesses Act, 1806 (46 Geo. 3, c. 37), which, they submitted, shewed that a witness might refuse to answer any question which exposed him to penalties, e.g., of ecclesiastical censure.

GORELL BARNES J. A decree of divorce having been obtained, a condition precedent to which must have been the proving of adultery, a separate suit is instituted, which is not

(1) [1891] P. 139.
(2) (1884) 10 P. D. 122.
(3) (1750) 2 Ves. Sen. 243.
(4) (1752) 2 Ves. Sen. 450.
(5) (1874) L. R. 2 H. L., Sc. 374.

in consequence of adultery but as following from the fact that a divorce has been obtained. That is my view, apart from authority.

But in *Stanhope* v. *Stanhope* (1) Bowen L.J. said: "The appellant's counsel tried to shew that the lis still continues, and they referred to the 22 & 23 Vict. c. 61, s. 5, which enables the Court, after a final decree, to inquire into settlements and deal with the settled property. But to assume that the lis still exists because the Legislature has given this power is begging the question, for it is consistent with the language of the enactment to hold it to mean that even though the suit is at an end the Court shall have power to vary settlements, and that seems to me to be the true view. The Legislature is giving, over and above relief in the suit, a relief outside the suit—a relief which is the creature of the statute." There is also a passage in the judgment delivered by Grove J. in the case of *Guardians of the Poor of the Nottingham Union* v. *Tomkinson*. (2) He says: "My opinion is that the words 'proceeding instituted in consequence of adultery' apply to proceedings which are really instituted to produce the result of divorce as a consequence of adultery—there may be possibly other proceedings to which the words apply—but they do not apply to such proceedings as those in the present case, which are not instituted in consequence of adultery and to bastardize, but to legitimatize the child." Of course that is only a dictum, but it follows on the same lines as before referred to, and shews that the objection cannot be maintained under the section.

But Mr. Willock argues that in a wider sense the objection to answer is maintainable, and he relies on dicta in *Redfern* v. *Redfern*. (3) Two authorities appear, however, to be entirely opposed to that view. The report of one of these I have not before me, but its effect is stated in a note to art. 129 of Stephen's Digest of the Law of Evidence, 6th ed. 1904, p. 147, where the learned author gives the effect of the decision in *Reg.* v. *Orton* (4), and says that "The question was, whether

(1) (1886) 11 P. D. 103, at p. 109.
(2) (1879) 4 C. P. D. 343, at p. 349.
(3) [1891] P. 139.
(4) (1874). See summing-up of Cockburn C.J., vol. ii. p. 719.

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A. committed perjury in swearing that he was R. T. B. deposed that he made tattoo marks on the arm of R. T., which at the time of the trial were not and never had been on the arm of A. B. was asked and was compelled to answer the question whether, many years after the alleged tattooing, and many years before the occasion on which he was examined, he committed adultery with the wife of one of his friends." Then there is the case of *Reg.* v. *Boyes* (1), which, though not in point on the matter of adultery, contains some very pertinent remarks by Cockburn C.J., who says (2): "Further than this, we are of opinion that the danger to be apprehended must be real and appreciable, with reference to the ordinary operation of law in the ordinary course of things—not a danger of an imaginary and unsubstantial character, having reference to some extraordinary and barely possible contingency, so improbable that no reasonable man would suffer it to influence his conduct. We think that a merely remote and naked possibility, out of the ordinary course of the law and such as no reasonable man would be affected by, should not be suffered to obstruct the administration of justice. The object of the law is to afford to a party, called upon to give evidence in a proceeding inter alios, protection against being brought, by means of his own evidence, within the penalties of the law. But it would be to convert a salutary protection into a means of abuse if it were to be held that a merely imaginary possibility of danger, however remote and improbable, was sufficient to justify the withholding of evidence essential to the ends of justice. Now, in the present case, no one seriously supposes that the witness runs the slightest risk . . . : it was therefore the duty of the presiding judge to compel him to answer."

Apart from the question raised under s. 3 of the Evidence Amendment Act of 1869, this broader point as to the witness subjecting himself to penalties is purely imaginary and obsolete.

It is my legal duty to require Major Blyth to answer, and I hold that he has no valid legal protection from being compelled to answer.

(1) (1861) 1 B. & S. 311. (2) 1 B. & S. at pp. 330, 331.

[The following were the questions and answers:—

(*Q.*) Did you, early in November, 1902, commit adultery with Mrs. Evans at (a place named)?—(*A.*) Yes.

(*Q.*) Mrs. Evans left her husband in February, 1903. How soon after that did you see her?—(*A.*) About a week or two after.

(*Q.*) And from that time have you been living with Mrs. Evans?—(*A.*) Yes.]

Counsel for the petitioner then proposed to put in the decree, but counsel for the infant objected.

Le Bas, for the respondent, took no part in the present proceeding.

Evidence having been given to the effect that the solicitors for the trustees of the settlement had been interviewed after this issue was directed and that they had stated that they should take no part, as the infant was represented by the official solicitor,

Counsel for the petitioner and for the infant addressed the Court on the evidence.

Cur. adv. vult.

On a later day the COURT (Gorell Barnes J.), after pointing out that the burden of proof rested on the petitioner, held that the petitioner had discharged that burden, and that he was not the father of the child.

H. D. G.

1904
April 27, 28, 29;
May 3, 4, 5, 6, 11, 12.

KAY *v.* KAY.

Divorce—Petition—Unfounded Charges of Cruelty and Adultery—Finding of Desertion—Immateriality—Refusal of Decree of Judicial Separation—Costs—Set-off.

Upon a wife's petition for dissolution of marriage, the charges of cruelty and adultery were negatived by a jury and held by the Court to be without foundation. The jury, in regard to a supplemental petition alleging desertion for two years and upwards, found that desertion was established as from February, 1901, whereas the petitioner's case put the desertion as having commenced when the parties ceased living together in July, 1900. The jury, from their finding on the other issues, appeared to have believed the respondent's and disbelieved the petitioner's case.

Upon the petitioner's application for a decree of judicial separation:—

Held, that, inasmuch as the parties, at the date when desertion was found by the jury to have commenced, had been living apart for some time, the finding of desertion at the later date was bad in law and immaterial for the Court to consider; that the petitioner was not entitled to a decree; and that the petition and supplemental petition must be dismissed.

The filing and prosecution of a suit for dissolution of marriage (or, *quære*, for judicial separation) precluded the petitioner from successfully pleading that the period of desertion was running during the time while the suit was being maintained.

Upon the question of costs:—

Held, that the petitioner was entitled to the costs of the issue of desertion, but to no costs on the other issues, and that the respondent was entitled to set-off, pro tanto, against his costs of these other issues, the costs to which the petitioner was held entitled in regard to the issue of desertion.

WIFE'S SUIT, praying for dissolution of marriage, custody of child, and further and other relief.

The original petition was filed in May, 1902; a supplemental petition, alleging "desertion without reasonable excuse for two years and upwards," was filed about the middle of December, 1903, and amended pursuant to order dated January 12, 1904, by alleging a further act of adultery.

The husband denied all the charges.

The jury, after a prolonged trial, found that the respondent

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had deserted his wife, but not, as her case was shaped, at the date in July, 1900, when the parties finally separated, but at a date in February, 1901, at which time he received a letter charging him with desertion and neglect to provide a home for his wife.

The other material dates and facts are stated in the judgment.

Upon further consideration by the Court as to what should be done upon the findings of the jury, and as to costs—

May 11. *Barnard*, for the petitioner. The wife (petitioner) is entitled as a matter of course to a judicial separation. The finding of the jury as to desertion simply follows the case of *Fitzgerald* v. *Fitzgerald*. (1) But, in the further report of that case, some years later (2), the judge acted on the previous adultery coupled with a finding of desertion, which presumably was founded upon a refusal by the husband—after a request by the wife—to resume cohabitation.

[GORELL BARNES J. It does not appear from the reports how the judge came to find desertion.]

In *Kettlewell* v. *Kettlewell* (3) Sir James Hannen allowed the petition to be amended, and afterwards a decree was granted. The next case to which it is desired to call attention is *Knapp* v. *Knapp* (4), in which the original petition was withdrawn, and then, after waiting till the statutory period of two years had elapsed, another petition was filed and the Court granted a decree. Then comes *Wood* v. *Wood* (5), where, the Court not having been satisfied as to cruelty, subsequently granted a decree upon a supplemental petition alleging desertion. That, it is submitted, is directly in point.

[GORELL BARNES J. I should like to hear the other side, because that case does seem to be in point, except that it was an undefended suit. *Fitzgerald* v. *Fitzgerald* (1) seems quite another point. Where the parties are in fact living apart and there has been no desertion, is not the remedy to sue for restitution of conjugal rights? If a wife caused her husband to go

(1) (1869) L. R. 1 P. & M. 694.
(2) (1874) L. R. 3 P. & M. 136; 43 L. J. (P. & M.) 13.
(3) (1880) 41 L. T. 737.
(4) (1880) 6 P. D. 10.
(5) (1887) 13 P. D. 22.

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away from her, could that be converted at a later date into desertion of her by him?]

Priestley, K.C., and *Le Bas*, for the respondent. All that the verdict of the jury comes to is that the respondent had determined to separate from his wife. The jury cannot, from their verdict on the other issues, have believed the wife and her witnesses as to their version of what happened in July, 1900. In *Fitzgerald* v. *Fitzgerald* (1) there is nothing to shew that overtures had been made by either of the parties to return to cohabitation; here they were made. The respondent in the present case was always willing to take his wife back. The jury have found desertion from February, 1901; but there was no "existing state of cohabitation" after July, 1900. The very essence of desertion is that the wife must at all times have been willing to return to her husband.

[GORELL BARNES J. Is there any authority for the proposition that, if cohabitation is brought to an end by the act of the complaining party, the statutory period of desertion may nevertheless be reckoned from the date of a refusal by the other party to return?]

Lapington v. *Lapington* (2) is an authority to the contrary.

[GORELL BARNES J. Assuming that there was no desertion originally, yet if the husband can and does desert subsequently, would a petition thereafter filed against him by his wife, on the grounds, for example, of cruelty and adultery, stop the statutory period of desertion from running?]

The petitioner cannot make the respondent guilty of desertion by making unfounded charges of cruelty and adultery against him. By filing a petition against him she keeps him at arm's length and renders any overtures futile.

In *Farmer* v. *Farmer* (3) Sir James Hannen simply said that, if the facts warranted it, the wife might file a fresh petition after the statutory period of two years should have elapsed. In the present case, the wife placed herself under the protection of the Court when she filed her petition for divorce, and it was impossible, after that, for her to say that the period of

(1) L. R. 3 P. & M. 136; 43 L. J. (P. & M.) 13. (2) (1888) 14 P. D. 21.
(3) (1884) 9 P. D. 245.

desertion continued to run. The essential element of desertion, that it shall be against the wish of the complaining party, is non-existent.

[They also referred to *Thompson* v. *Thompson* (1), *Ward* v. *Ward* (2), *Knapp* v. *Knapp* (3), and *Parkinson* v. *Parkinson*. (4)]

If a petitioner filed a petition praying for dissolution of marriage on the ground of cruelty and adultery, and made a similar application by supplemental petition on the ground of desertion (coupled with the adultery), the Court would not allow the petitioner to pray in the alternative for restitution of conjugal rights. Such alternative prayer would be wholly inconsistent.

Barnard, in reply. In *Fitzgerald* v. *Fitzgerald* (5) the wife waited till she could plead desertion, because the remedy given by the Act of 1884 would not have been open to her if her husband had failed to comply with an order for restitution of conjugal rights. The cases of *Knapp* v. *Knapp* (3), *Kettlewell* v. *Kettlewell* (6), *Wood* v. *Wood* (7), and *Farmer* v. *Farmer* (8) are all in favour of the petitioner's present contention. The question is, did the respondent intend to desert the petitioner before she commenced proceedings?—*Drew* v. *Drew*. (9)

The arguments as to costs appear sufficiently in the judgment.

Cur. adv. vult.

May 12. GORELL BARNES J. This case was tried before me and took several days, and it stood over until yesterday for the consideration of the effect of the finding of the jury and on the question of the costs of the trial.

The dates which it is necessary to refer to are these. The original petition, which was for divorce, was filed on May 30, 1902, and the charges were cruelty, and adultery with three people named in it, and a general allegation of adultery with divers other women. I think the particulars with regard to

(1) (1858) 27 L. J. (P. & M.) 65.
(2) (1858) 27 L. J. (P. & M.) 63.
(3) 6 P. D. 10.
(4) (1869) L. R. 2 P. & M. 25.
(5) L. R. 1 P. & M. 694; L. R. 3 P. & M. 126; 43 L. J. (P. & M.) 13.
(6) 41 L. T. 737.
(7) 13 P. D. 22.
(8) 9 P. D. 245.
(9) (1888) 13 P. D. 97.

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"divers other women" were not filed until December, 1903, with a further averment, on January 16, 1904, amplifying those particulars, with regard to some woman named Marsh, with whom adultery was charged as coming under the words "divers women." There were other particulars under the first petition, but I do not think it is necessary to refer to them at the moment any further. The other material dates are these. A supplemental petition was filed on December 22, 1903, alleging a charge of desertion without reasonable excuse for two years and upwards, and that supplemental petition was amended on January 12, 1904, by alleging a charge of adultery in the month of September, 1902—that is after the date of the first petition —with a woman named Cooke. I think, if I recollect right, that the date of the adultery alleged with the woman Marsh was prior to the date of the first petition.

The jury found that the respondent had not been guilty of cruelty; that he had not committed adultery with anybody with whom adultery was charged, but that he had deserted the petitioner for two years and upwards without reasonable excuse before the filing of the supplemental petition, and that the desertion commenced at the time of the receipt of a letter (I think the date was February 13, 1901) from a Mr. Mackrell, which has been taken to have been received on February 14; and so the date of the commencement of the desertion, according to the jury's finding, was February 14, 1901. Now that finding has given rise to the difficulty in this case, and upon it arguments were addressed to me at some length. Two points in connection with that finding present considerable difficulty and have required careful consideration. The first of these points I understand is, in substance, that having regard to the dates which I have mentioned, and to the fact that the desertion which has been found commenced two years before the supplemental petition, the finding is immaterial, because the act of filing the original petition, according to Mr. Priestley's argument, has in effect put an end to the desertion. The other point was that the desertion which the jury have found commenced, according to their finding, at a date when the two parties were in fact living apart in such circumstances that

there could be no desertion, as a matter of law, on the part of the husband. I will deal with the latter point first. The desertion is found to have commenced at a time when (there is no dispute whatever about this) the parties were not residing together and were not, in fact, living together as man and wife; and the question seems to me, on this, to be, How is that finding of the jury with regard to desertion to be dealt with, interpreted, or considered, having regard to certain admitted facts in the case? Now the admitted facts of the case on this point are, that the parties were living together in the petitioner's father's house until July 7, 1900, and they were not living together on February 14, 1901.

The petitioner's case that was opened to the jury and was maintained throughout was that the husband left the wife on July 7, 1900, and had from that time always refused to come back to her, provide for her, or do anything for her. That is the substance of her case.

On the other hand, the respondent's case was that he was turned out of the house of the father, where he and his wife were living, and that his wife (of course I am stating this broadly—it was put in a variety of ways) refused to come and live with him, and would not leave her father. That is the broad issue with regard to the earlier part of the separation, and a great deal of the evidence as to this question of desertion was given to shew what took place between the parties on July 7, 1900. There were, in fact, certain matters in controversy after that date, and a very substantial, if not the main, issue in the case was as to what took place at and about that particular time. According to my recollection the jury were invited by the petitioner's counsel to accept the account which was given by her and her witnesses as to the occurrence in July, 1900; and, on the other hand, the respondent's counsel urged them to accept the view which was presented on the part of the respondent with regard to what took place at that time. It seems to me that the issue between the parties with regard to that particular time—July 7, 1900—was so marked that, having regard to the finding of the jury, it seems to me impossible for them to have fixed upon February 14, 1901,

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without disbelieving the petitioner and her witnesses with regard to the occurrence which took place in July, 1900.

I say that from the whole course of the case and from the way in which the jury have dealt with the particular finding, and especially having regard to the other findings in the case, which must have been arrived at by considering broadly the questions of credibility.

Then it seems to me one is placed in face of this matter. Having separated in July, 1900, and being apart in fact in February, 1901, one is forced to see what this finding must really mean as to the cause of the original separation; and it seems to me that the finding necessarily shews that, having regard to the way the case was contested and the questions put before the jury on both sides, the original separation was brought about by the fault of the petitioner and her father.

If that is so, what is the position in the month of February, 1901, from which date the finding proceeds? It seems to me that at that time the cohabitation between the parties had, in fact, ceased. According to the principles which are to be found laid down in the cases of *Fitzgerald* v. *Fitzgerald* (1) and *Bradshaw* v. *Bradshaw* (2), a charge of desertion must be made so as to make the desertion commence at a time when the cohabitation of the parties—not only in the strict sense of that term, but in a modified sense of that term, as explained in *Bradshaw* v. *Bradshaw* (2)—has ceased. But, having regard to what I have said as to the view the jury must have taken of the act of the petitioner, I think that charge of desertion in this case cannot be maintained. In *Fitzgerald* v. *Fitzgerald* (1), without going into the facts of it, the Judge Ordinary (Lord Penzance), who heard it, used the expressions which have been more recently considered. He said (3): "No one can desert who does not actively and wilfully bring to an end an existing state of cohabitation. Cohabitation may be put an end to by other acts besides that of actually quitting the common home. Advantage may be taken of temporary absence or separation to hold aloof from a renewal of intercourse. This

(1) L. R. 1 P. & M. 694. (2) [1897] P. 24.
(3) L. R. 1 P. & M. at p. 698.

done wilfully, against the wish of the other party, and in execution of a design to cease cohabitation, would constitute 'desertion.' But if the state of cohabitation has already ceased to exist, whether by the adverse act of the husband or wife, or even by the mutual consent of both, 'desertion' in my judgment becomes from that moment impossible to either, at least until their common life and home have been resumed. In the meantime, either party may have the right to call upon the other to resume their conjugal relations, and, if refused, to enforce their resumption; but such refusal cannot constitute the offence intended by the statute under the name of desertion without cause." Now that judgment was referred to in the case of *Reg.* v. *Leresche* (1); but the President (Sir F. H. Jeune) and I considered it more recently in the case of *Bradshaw* v. *Bradshaw* (2); and this is what the President said about that case and *Reg.* v. *Leresche* (1): "There is a very common misunderstanding of the effect of those two decisions. It is true that there cannot be desertion of a wife by a husband unless the cohabitation is broken by some act of desertion. But cohabitation does not necessarily imply that a husband and wife are living together physically under the same roof; if that were so, there would be large classes of persons to whom the term could have no application; married domestic servants, for example, who cannot live day and night under the same roof, but yet may cohabit together in the wider sense of the term. The two cases cited have one common feature: in each of them there were two persons living separate from each other by mutual consent and not cohabiting together; and in such a case there clearly could not be desertion unless there were a resumption of cohabitation." The only effect of that is to shew that the word "cohabitation" as used in *Fitzgerald* v. *Fitzgerald* (3) does not necessarily mean that the parties are living together under the same roof, but that there may be states of cohabitation where they see as much of each other as they can, and yet are not separated because there has not been any real suspension of their ordinary conjugal relations. A

(1) [1891] 2 Q. B. 418. (2) [1897] P. 24, at p. 26.
(3) L. R. 1 P. & M. 694.

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man may be cohabiting with his wife even if he is away on a visit or on business; because the conjugal relationship is not determined in any shape or form, and it is in that sense the President speaks of the case of *Fitzgerald* v. *Fitzgerald*. (1)

Then it was said in this case, although the cohabitation had ceased on or before the month of February, 1901, that after that time, at any rate, the husband must, according to the finding of the jury, be taken to have refused to resume cohabitation, because he did not, according to the view the jury must have taken to have arrived at their finding, comply with what was requested in a letter or letters in February, 1901; in other words, it was put that desertion may commence although the parties are separated if there is a demand for cohabitation, and perhaps provision and so forth, and a refusal to comply with that demand. Now I have endeavoured to follow the line of that argument, and I confess I fail to appreciate it; because it seems to me, having regard to the cases I have referred to, if the only difficulties between the parties are with regard to an alleged desertion, and they are at that time separated in such circumstances that they have become separated by the act of the complainant, that then the complainant's remedy would appear to be a suit for restitution of conjugal rights. Mr. Barnard referred me to a second report of the case of *Fitzgerald* v. *Fitzgerald* (2), from which it would seem that, at a later period than the decision in 1869 on the first hearing of the case, there had been an application to the respondent by the petitioner, through her solicitor, to resume cohabitation, and that had been disregarded; and that a third petition was presented, and the judge had found, on that petition, that the charges of adultery and desertion were established. The report is on another point, namely, on the question of the power of the Court to shorten the time for the decree absolute. I do not find anything in that report to shew on what principle the matter is to be dealt with, other than those considerations to which I have already referred. According to the original report there seems to

(1) L. R. 1 P. & M. 694.

(2) (1874) 43 L. J. (P. & M.) 13; also reported L. R. 3 P. & M. 136.

have been no real opposition on the part of the respondent to the petition. It is stated in that report (1): "The respondent did not traverse the allegations in the petition, and it was stated that he was quite willing that the petitioner should succeed in obtaining a decree if she could establish a right to it." And in this later report, in 1874, it is stated with regard to the third petition that the husband appeared but filed no answer. So that these matters which have now been argued before me on this part of the case do not seem to have been investigated or considered, at any rate so fully, in the earlier cases.

Now the jury, as I have said, appear to have taken the view that from the date of the solicitor's letter in February, 1901, the respondent should be treated as having intended to keep apart, and to have kept apart, from his wife. I have not to consider at present whether that finding is right or wrong. If anybody desires to question it, they must question it elsewhere; but it is extremely difficult to understand how that finding can have been arrived at when, as I have said, a main issue, if not the main issue, on this question of desertion was, according to the view which I have expressed, decided, and must have been decided, in the view of the jury, adversely to the petitioner; and they could not, I think, have believed the petitioner on the main controversy as to the cause of the separation in the month of February, 1901. The result on this point is that, in my opinion, the finding, having regard to the course the case took and the admitted dates and facts, is really a finding which is legally adverse to the petitioner, having regard to what was the legal position of the parties on February 14, 1901. That is one point in the case. The other point upon which it is necessary for me to express an opinion is one also of very considerable difficulty. That point was raised by Mr. Priestley, and is to the effect that the two years which are necessary to constitute desertion had not expired at the date of the original petition, and that the petitioner's position is not improved by filing a supplemental petition after the two years had expired.

Upon this point I think I may almost say a shower of cases

(1) L. R. 1 P. & M. at p. 694.

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were furnished to me, and an attempt was made to extract from them some principle upon which the Court should be guided in coming to a conclusion upon what is a very difficult point.

The point, as made for the respondent, seems really to be, that during the necessary two years the attitude of the petitioner to the respondent must be such as to admit of his returning to cohabitation, and that by filing, prosecuting, and maintaining a petition for divorce, as between the alleged date of desertion and the time of the two years expiring, the petitioner had taken up a position which rendered it impracticable for the respondent to return to cohabitation. On the other hand, the argument for the petitioner comes to this—that the time runs on, notwithstanding the petition, unless the respondent takes some means to bring it to an end, and that the finding of the jury in effect shews he did not do so. Many of the cases which have been cited do not appear to me to assist upon this point; but there are some that I think I ought to refer to. The first I think is the case of *Kettlewell* v. *Kettlewell.* (1) This was relied on by the petitioner's counsel. That was a suit brought on the ground of cruelty and adultery, and it was alleged that the respondent finally ceased to reside with and left the petitioner in November, 1877; but the two years requisite to constitute legal desertion were not completed at the time of the filing of the petition in the suit. No appearance was entered on the part of the respondent; and then the suit came on for hearing before the President (Sir James Hannen) on November 13, 1879. The Court was satisfied with the evidence of adultery, but dissatisfied with the evidence as to the alleged cruelty. On an affidavit verifying this statement of facts, an application was made to the Court at the hearing for leave to amend the petition by adding a paragraph alleging desertion for two years and upwards against the respondent, and that application was granted; so that all that that shews is that, in an undefended suit, leave to amend the petition was granted. That is not a decision as to what, in principle, ought to be done, nor as to what, in a contested case, would be the legal position of the parties when such an amendment came to be considered.

(1) 41 L. T. 737.

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The next case is *Knapp* v. *Knapp*. (1) That was a wife's petition for dissolution by reason of cruelty and adultery; and when the case came on, it being doubtful whether the charge of cruelty could be sustained, that petition was by leave of the Court withdrawn, and another petition was afterwards filed for dissolution of marriage by reason of the same adultery coupled with desertion for two years, which had not accrued at the date of the first petition. The respondent in that case also did not appear; so the authority is a doubtful one, the suits being undefended. There is however, to my mind, an important view presented in the judgment, which has a bearing upon what I have to say in considering this matter in point of principle. The President (Sir James Hannen) said (2): "It is clear that at the time when the respondent left his wife, eloping with another woman, he deserted his wife, and if that state of things continued for two years, the petitioner would have been entitled to institute a suit for dissolution of marriage. It is true that she did institute a suit for dissolution of marriage upon the ground of cruelty and adultery, and for some time before two years had elapsed was seeking to have her marriage dissolved; but that is not inconsistent with her afterwards abandoning that suit, and after having waited the requisite time, instituting another suit on the ground of her husband's adultery and desertion."

This is the really important passage, to my mind, which affects the view I entertain about this matter: "There never was a time at which the petitioner was bound to go back and live with him, because she was always justified in refusing to do so as long as he continued to live with the woman for whose company he had abandoned her; and, therefore, as it was in the beginning desertion on his part, and the circumstances have never been changed, that state of things, which was a desertion in the first instance, has continued such for now more than two years; and consequently the petitioner is entitled to succeed."

The point made there is this, although the matter was not argued in the way it has been considered now, that if the husband deserted his wife and then is living with another woman,

(1) 6 P. D. 10. (2) 6 P. D. at p. 11.

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the mere fact that the petitioner institutes a suit for dissolution within the time and then drops it and brings a suit for dissolution after the time has expired, the mere fact of filing the first petition at a time when, apart from the question of desertion, the wife is in no way bound to go back to the husband, because he has committed adultery and is living in adultery, will not stop the desertion running. That is quite intelligible. To my mind a different position arises when the circumstances are such that there is nothing intervening between the parties but the matter of desertion, which can be put an end to at once.

The next case is *Wood* v. *Wood* (1), which was also an undefended case. It was first before the Court in June, 1886, and no defence was offered; and then again it was proved that in 1884 the respondent left his wife; he never afterwards lived with her; and from October, 1884, he lived on certain premises with another woman; and the President (Sir James Hannen) then found that he had committed adultery, but that desertion for two years had not been proved, and he offered to adjourn the hearing or pronounce a decree of judicial separation.

The hearing was adjourned; a supplemental petition was filed in August, 1887, more than the two years after the desertion and the living with the other woman had begun, and the desertion was alleged as in October, 1884, when the man went to live with the other woman—not at the time he left the respondent. The case having been heard and the petitioner having given evidence that the respondent did not return to cohabitation, the woman was called, saying she had lived with the respondent since 1884, apparently throughout the whole period, and a decree for dissolution was pronounced, desertion being then established. But the view that is being now discussed was not presented to the Court; and, still more important, there was never, in that case, a state of circumstances under which the petitioner would have been bound to go back to her husband if he had come to her and said, "True I have deserted you, but I wish to put an end to it."

I do not think myself that the case of *Lapington* v.

(1) 13 P. D. 22.

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Lapington (1) has really very much bearing on the matter, because Butt J. seemed to think there was no real difference between amending the petition by adding new charges and filing a supplemental petition, and seems to have taken the view that the complete cause of action must arise before the suit was commenced, and that it was not to be got over by a supplemental petition; but whatever view should be entertained about it, Mr. Searle, who appeared, said he preferred to withdraw the petition and begin de novo; so there is very little to be gathered from it, except in so far as it may be rather adverse to the present petitioner. The other questions do not really throw any light on what I have to consider. Now I have to look at this matter as a question of principle. Desertion really means a wilful separation by the respondent from the petitioner without reasonable cause and without the consent of the petitioner: of course I am stating it quite broadly. That is the real position; and it seems to me, in order to maintain a desertion throughout that time, there must be, in fact, a state of things which keeps up the desertion throughout the whole of that period so far as it is necessary to deal with the matters in this Court, having regard to the two years' time, either for judicial separation or as forming one of the matters which give ground for a divorce. It seems to me that if nothing has happened during the two years to entitle the wife to refuse to return to the husband, if he desires to put an end to the desertion, the petitioner, by filing a petition for divorce in the interval, and making and maintaining throughout charges which are in fact unfounded—and by that I mean charges which it is shewn give her on the real facts of the case no right to say to him, "I will not have you back if you offer to return"; and then, as an incident in those proceedings, obtains an order for alimony and enforces it—that, I think, puts it out of the power of the respondent to do anything, and it seems to me it is a position in which, by her own act, the petitioner is shewing that she is no longer—no matter what his attitude is—ready to receive him back, and can, I think, no longer be held entitled to treat him as continuing to desert her. It is an

(1) 14 P. D. 21.

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absolutely inconsistent position. He, it is true, remains away, and his attitude of mind is precisely the same. By her action she has put it out of his power practically to return; she is no longer willing to receive him, and she maintains those charges throughout the whole period that covers the time after. Now I think that is a different position to the case dealt with by Sir James Hannen, where a petition for divorce is presented within the two years under circumstances which entitle the wife to say that the husband has, in fact, deserted her at the commencement, and that his conduct has been such as to warrant her in refusing to receive him back.

Then there is no valid reason why the desertion should not be treated as continuing to run on, so as to entitle her to say that there has been desertion to begin with—that his conduct has been such as to shew that she is not bound to have him back, and that therefore she is entitled to treat it as desertion right through from beginning to end. That seems to me to be the legal position of the parties; and, if my view is correct about that, it follows that the finding of the jury is not material in this case, and does not entitle the petitioner to the relief which she now seeks to obtain by way of asking for a judicial separation, having failed to obtain a decree of divorce.

Now the only other question is that of costs, and it is obviously a matter which is very serious to the persons concerned, as the case lasted a considerable time. The case for the petitioner is that she desires to have full costs of the issue of desertion, because the case shewed a proper and reasonable foundation for that, and that the finding on that part of it has been successful; and she asks that she should have her costs, up to the sum secured, with regard to the issues on which she has not succeeded. On the other hand, the respondent asks, while not objecting to being held responsible for the costs so far as they relate to the charge of desertion, that the petitioner should not receive the costs of the issues on which she has failed, and that the respondent should be entitled to deduct from what he has to pay in respect of the charge of desertion so much of his costs as have been incurred in meeting those charges on which the petitioner has failed.

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I may say that raises a very serious question which has to be considered by the light of the authorities in this Court, and by the way in which this case has been presented and conducted. In the case of *Ash* v. *Ash* (1) the judgment which I delivered goes fully into the earlier cases, and, following on their lines, shews the principles on which the Court acts in allowing the costs of the wife—costs which she has to incur in either prosecuting her case or defending herself; and, broadly speaking, the principle is, that if the costs have been reasonably incurred on her behalf in presenting a case of a reasonable character, so that she is justified in going to her solicitor and obtaining security for herself and indirectly for the solicitor, then she is allowed her costs although she fails. But the essence of that position is that the charge shall have substance and that the costs shall be reasonably incurred; and if charges are presented which have no reasonable basis—no reasonable prospect of success—they are treated as costs which are incurred at the risk of those who have incurred them, and not at the risk of those who have to find security for them; because, while on the one hand the wife and the solicitor she employs have to be protected—she directly and he indirectly through her—so as to put the wife, as the state of the law is at present, in funds to fight the case either against her husband as petitioner, or to answer his charges as respondent, on the other hand, the husband requires protection against charges being flung against him which are unfounded in their character, and he wants protection from being saddled with enormous and unnecessary expenses. That question has required great consideration in arriving at a conclusion, and upon it I proceed now to express my opinion.

There are two sets of charges to consider; I leave out the charge of desertion altogether, because on that there can be no question there was a case for the wife to present on which she had evidence, and on which she has—to the extent to which the jury have dealt with it—succeeded; and there is no controversy about that at all.

But that particular point throws a flood of light on the rest

(1) [1893] P. 222.

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of the case, because I think, after hearing the case for a great many days, the conclusion to which I came was practically that of the jury, that the only real contest between the parties was on this question of desertion. The original petition in this case, as I have already pointed out, charged cruelty and adultery; but that petition was launched in 1902, at a time when I think, if I recollect aright, no suggestion had been made throughout the correspondence, and none, if I recollect aright, in the solicitor's letter, making any case of cruelty against the husband; and it was also launched on the charge of adultery, which I will deal with afterwards. Then, when the case was brought into Court, the charges of cruelty are persisted in, and one has to consider what are the nature and character of them. They were very numerous: there were three instances on which it was alleged that the respondent struck the petitioner. But when those charges are sifted, as they necessarily must be in dealing with a case of this kind, they appear to me to be of the most unsubstantial character possible, and to be charges for which there was really practically no corroboration whatever. Now I say that advisedly, because, having read through these notes again, I looked to see what the charges were (I think I dealt with them pretty fully in my summing-up), and the bulk of them had no corroboration whatever.

The three incidents of striking alleged—one was at Ambleside, which had no corroboration whatever; another near Manchester, a place called Haywood, had no corroboration whatever of what actually occurred: it was said that there was some mark on the wife afterwards, but that of course is consistent with the matter having happened in any way; and the last incident, which was the one on which so much stress was laid in the case, was an unpleasant row in the street on June 6, 1901, when there is not the slightest doubt whatever that the petitioner and her father were the aggressors, and when the result of it was a summons to pay the damages caused to Mrs. Hammond's house; and that was settled by payment of damages.

There had been an action for slander brought against the petitioner's father which resulted in a verdict against him with

costs at the Liverpool Assizes, and it is impossible if cruelty were the only allegation in the case to suggest that there was any foundation for such charges.

Now it seems to me, having regard to those matters and the way in which this case was conducted, that there was no foundation whatever for making the charges of cruelty against the husband, and that that was not really the contest between them, but that the contest between the two parties was the question of desertion and nothing more. No one says, when this man was turned out of the house, or, as the other side say, when he left, that anything was said as to cruelty to his wife which is alleged in this case.

Then there came the charges of adultery. This case was presented in the most remarkable way. There were three charges of adultery against named persons in the original petition. One was a person named Ormond. The only foundation for that charge, which was made in the course of the inquiry before myself and the jury, was that in passing along the street a certain person (who was said by the respondent to be another person) had made the remark "Good-night" to him, and he had made the remark "Good-night" to her; and, upon that, a charge of adultery was put forward on the basis of the fact alleged by the wife that this was a prostitute in Blackpool, and that therefore there must have been adultery between the respondent and that woman. A more ridiculous charge I think I have never heard in my life. There was no corroboration whatever put forward in support of that case.

The next charge put forward was with Mrs. Hammond, who was the lady from whose house the respondent had been married, and at whose house he and his father and mother had all been staying at the time of, or up to the night before, the fracas on June 6, 1901, the father and mother having left them the night before. The husband was alone at that house on the following night, June 6, and of course it was pretty obvious when this lady was in the box that there was nothing whatever in the charge: in fact, that case was never opened. Mr. Barnard acted quite rightly, as I have pointed out already, in not opening that case, and not opening

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the case of the charge with another person named Ormerod. But when one puts one's self back into the position of those who are advising at the beginning of the case and know what the position of the people is, it seems to me there was never a shadow of a ground for putting forward such a charge of adultery as was alleged. And it is material, in considering the conduct of this case, to recollect that those two charges which I have just dealt with were never abandoned from first to last. They were not opened, but they were not abandoned.

The last charge of adultery with a named woman was with a person named Roberts, and this seems to have been—as far as I recollect the facts—initiated by the petitioner. The solicitor who was employed by her went down to see this girl; it appears she had had a child by some one else, whose name was furnished, though there was a dispute between her and the solicitor as to what the real name was, but at any rate it was not the respondent; she maintained that she had had nothing whatever to do with the respondent and that some one else was the person with whom she had been intimate. That girl has since married and was called into the box on another part of the case, and also denied this particular charge. That charge had been dropped and abandoned, if I recollect the date aright, in the month of February, 1904. I do not remember exactly why it was dropped—whether it was because she was to be examined or what I do not know; for some reason or other it was dropped, and it was intimated that that would not be gone on with.

But there was a very remarkable fact connected with that incident—that, without any material for a fresh interview, the solicitor went down to see the girl again; and, having no more material, and having her story before him, one can hardly help drawing an inference, seeing that there is no case connected with that matter at all, that there was the object to endeavour to induce the girl to make it. I have already pointed out I think in my summing-up that there was no reason to suppose the solicitor was guilty of misconduct; but still if a girl has already told her story and there is no new matter come to light to see if she would adhere to it, it is not unnatural that it

should be suggested whether it was not done to put pressure upon her.

Now the fact that those charges have been put forward and disposed of as they have been throws a very considerable light on the rest of the case with regard to adultery. I have already said that the dates establish that the charges were put forward by particulars under the old petition with regard to Marsh in the month of December, 1903, and with regard to Cooke in the month of January, 1904. But now, how did those charges come into existence? It is perfectly obvious that, having no case whatever of adultery up to the time when those charges were launched, or shortly before, when they were discovered or said to be discovered, an attempt was being made to find out a case against the respondent on which a charge of adultery could be made, and a process was adopted which produced certain results. A detective was employed who was not called; another woman was put on the scene somehow, I do not know exactly how, who was not called; a photograph was handed about, and out of the streets in Blackpool two prostitutes were produced who alleged that this man, the respondent, had been committing adultery with them; and it was sought to back up the evidence of those two prostitutes by a cabman who had driven one of them about, and by two other people, a mother and daughter, with whom one of them had been living; and by those means and on those materials it was sought to make a case against the respondent.

Now, I can understand a case of that kind being presented when you have some evidence against the respondent of being a dissolute and drunken character, or something that shakes the confidence one has naturally in a business man of respectable position. But when you find the only real dispute between the parties was a dispute as to whether there was desertion, which after all went to money matters—when no attack whatever was made on this man's character, and nothing at all was suggested against him outside the particular incidents of the case which formed the basis of the charges—it seems to me absolutely hopeless to expect any tribunal to believe a case presented by a prostitute or two supported by a cabman and some one else picked up in the way this case presents.

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If that is so, it seems impossible to see how anybody, however respectable, could hope to defend themselves successfully against charges put forward in that way.

As an instance of how this case was conducted, one of the charges made against the respondent with one of the prostitutes was at the temperance hotel at Preston. I think, if I remember right, a detective had been four times at that temperance hotel; and it was said in the particulars—and repeated in the second set of particulars—that the charge was maintained; yet when that prostitute came into the box she said that was a mistake—she had never been there with that particular man; but no intimation was given that that particular incident was not going to be pressed, and they had to bring up a person from the hotel to meet the case if the girl came into the box and said it, though she seems to have told the side who called her that it was a mistake. That throws a flood of light on the way this case was being conducted and presented. Those charges failed, and rightly failed. And it seems to me, when you look at this case broadly—when you look at it from the point of view of the details of it as it was pressed, and as it was got up by the petitioner's side, it was a case which was hopeless so far as the charges of cruelty and adultery were concerned from first to last, and that it was unreasonable to present those charges; that they were charges which were really recklessly and oppressively put forward against the respondent. My view, therefore, of this case is that the petition and supplemental petition must be dismissed; that the costs of the petitioner allowed to her shall be the costs of the issue of the charge of desertion; that with regard to the other charges she is not entitled to have any costs; and that the respondent will be entitled to set off his costs of meeting those charges on which the petitioner has failed against the costs he will pay in connection with the charge of desertion.

Solicitors for petitioner: *Busk, Mellor & Norris, for Roland W. Robinson, Blackpool.*

Solicitors for respondent: *Ayrton, Biscoe & Barclay, for Cobbett, Wheeler & Cobbett, Manchester.*

H. D. G.

HYMAN *v.* HYMAN AND GOLDMAN (THE KING'S PROCTOR SHEWING CAUSE).

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July 18.

Divorce—Practice—Husband's Petition—Decree Nisi—Damages and Costs against Co-respondent—Subsequent Condonation—King's Proctor's Intervention—Effect of such Condonation on Order for Damages and Costs.

The effect of condonation of a wife's adultery by her husband, after decree nisi and before decree absolute, considered.

If a petition is dismissed by reason of condonation it is dismissed for all purposes, and cannot be kept alive temporarily for the purpose of enabling a petitioner to recover damages which have been awarded against a co-respondent in the suit, but the co-respondent may still be held liable for, and may be ordered to pay, the costs of the suit, which, on the intervention of the King's Proctor and by reason of condonation subsequent to decree nisi, has been dismissed.

The petitioner, in such a case, may be ordered to pay the costs of the King's Proctor's intervention, but he may add the amount of these costs to the costs which he is still held entitled to recover from the co-respondent.

Long v. *Long and Johnson*, (1890) 15 P. D. 218, doubted.

HUSBAND'S PETITION for divorce.

Motion by the King's Proctor to rescind the decree nisi and dismiss the petition on the ground of condonation since the decree nisi, which was pronounced on November 17, 1903.

The King's Proctor's plea, dated June 20, 1904, alleged that material facts had not been brought to the knowledge of the Court; but the only fact specified in the plea was to the effect that the petitioner had condoned the adultery complained of, "in that in or about January, 1904, at 458, Waterloo Road, Burslem, in the county of Stafford, he resumed cohabitation with the respondent, and from the said date the petitioner and respondent have been and are still living together there as man and wife." The King's Proctor prayed the Court "to rescind the said decree nisi, to dismiss the petition, and to make such order in the premisses as shall seem meet."

The petitioner's answer to the King's Proctor's plea stated that "he admits the allegation therein contained and does not object to the decree nisi being rescinded except in so far

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as it directs payment of the damages and costs by the co-respondent."

The petitioner's solicitors, under date July 4, 1904, inclosed a copy of the answer and wrote to the King's Proctor to the effect that the petitioner took his wife back for the sake of the children of the marriage, "and of course had no intention of applying for the decree to be made absolute."

The King's Proctor, in acknowledging the receipt of that letter and copy answer, intimated that the Court would be moved to rescind the decree nisi, and said that he assumed that the petitioner would serve the co-respondent with a copy of the answer.

The petitioner's solicitors, in reply, said that, "seeing that the co-respondent did not appear and that the cause was undefended," they were inclined to think that he was not entitled to be served with notice of the present proceedings; but that if the Court should think otherwise, the motion might be adjourned for him to have notice.

Notice of motion was served by the King's Proctor, praying for the rescission of the decree, the dismissal of the petition, "and that the petitioner be condemned in the costs of the King's Proctor."

On July 11 the motion came on, but was adjourned for a week on the application of the co-respondent, to whom leave was given to enter an appearance on condition that he paid the costs of the adjournment within the week.

On July 18 the adjourned motion came on before the President, the co-respondent having meanwhile filed two affidavits.

Victor Russell, for the King's Proctor, moved the Court in terms of the notice of motion.

C. W. Kent, for the petitioner. Under the Matrimonial Causes Act, 1857, s. 30, no ground has been shewn for dismissing the petition with costs.

The petitioner might start de novo, claiming damages alone. Sect. 33 of the Act of 1857 gives him the right to file a petition for that purpose only, or he might have prayed for a judicial

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separation—in which case the King's Proctor would have had no right to intervene. It would not be equitable to deprive the petitioner of the damages awarded by the jury merely because he subsequently forgave his wife and took her back to live with him. In *Long* v. *Long and Johnson* (1) the Court (Butt J.) gave judgment against the co-respondent for damages and costs, without any decree being pronounced against the respondent. Would the Court allow the prayer of the present petition to be amended by asking only for damages and costs against the co-respondent?

[THE PRESIDENT. That might be allowed, but it would involve a fresh assessment of damages.]

It is submitted that the co-respondent is only entitled to be heard on the question of costs.

Nield, for the co-respondent. Under the old practice the co-respondent would have been entitled to be heard to prevent the decree being made absolute. The two affidavits now filed should warrant the Court in ordering that the whole matter should be reopened. There can be no splitting up of the decree. *Long* v. *Long and Johnson* (1), so far as it conflicts with *Bernstein* v. *Bernstein, Sampson, and Turner* (2), must be taken to be overruled by it, and the latter case shews that the petitioner is not entitled to damages. As to costs, it is conceded that s. 51 of the Act of 1857 gives the Court a discretion. But the affidavits shew that the co-respondent, who was a lodger in the house, behaved to the respondent, in presence of the petitioner, in a way that the petitioner should have resented, and that, subsequently, an argument was open as to who was the father of the child of which the respondent was then pregnant.

C. W. Kent, in reply. The co-respondent should have appeared in the suit and alleged these matters, if he believed there was anything in them. Many matters mentioned in the affidavits are merely hearsay.

[THE PRESIDENT. If they are true, it looks as if the petitioner and respondent intended to come together again after decree.]

(1) 15 P. D. 218.

(2) [1893] P. 292.

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JEUNE P. The main question is a question of law, and, although it is not new, I have not been referred to any reported case in which it has been discussed and decided before. The point is, What is the effect of condonation of a wife's adultery by her husband after decree nisi and before decree absolute?

Acts committed after decree nisi may properly be brought to the knowledge of the Court by the King's Proctor, and may have a material bearing on the fate of the case. It very frequently happens, although I cannot cite at this moment any specific authority from the books, that the King's Proctor brings to the knowledge of the Court adultery, for instance, committed after the date of the decree nisi, which, in the absence of any special circumstances, has the effect, not only of stopping the decree from being made absolute, but of setting aside the decree nisi. When one considers the matter, this must be the logical effect, because the decree absolute is the only final decree in the suit. It was not till after the machinery of the Divorce Court had been tested and revised that the decree of divorce, which originally was one final decree, was split into two. But this did not prevent the decree absolute from being the one final decree in the cause. I have now to determine whether the decree absolute is to be pronounced in this case; if not, the decree nisi must, in my judgment, go too. Deciding, as I do, that the decree absolute cannot possibly be made in this case, it is clear also, to my mind, that the decree nisi must be rescinded.

Then comes the really important part of the case, namely, what is to be done with regard to the co-respondent in respect of the damages and costs. The petitioner's counsel suggests that in some way or other I should allow the decree nisi to have the effect of giving to the petitioner the damages and costs awarded and ordered to be paid by the co-respondent. This involves a question or questions of law. I think, however, that it is governed by the decision in *Bernstein* v. *Bernstein, Sampson, and Turner*. (1) If the decree absolute cannot be pronounced, then the prayer for damages fails also. This, shortly stated, is the effect of the decision of the Court of

(1) [1893] P. 292.

Appeal, which approved *Story* v. *Story and O'Connor* (1), and overruled *Pomero* v. *Pomero*. (2)

It was, however, urged before me to-day that although that may be the effect of the decision in *Bernstein* v. *Bernstein, Sampson, and Turner* (3), it may yet be possible to leave so much of the decree nisi standing as would carry damages and costs against the co-respondent, and for this proposition the case of *Long* v. *Long and Johnson* (4) was relied on. I confess it seemed to me at first as if that case might be followed in the present instance. I think that Butt J. intended to separate the case against the co-respondent from that against the respondent, and to hold that there ought to be a verdict and judgment against the co-respondent, but not against the respondent, she not having been a willing party, and although sexual intercourse was held to have taken place she was not in any sense responsible for it. I do not wish to express any opinion upon that decision, because I am not sure that it follows that, because a co-respondent can be dismissed from a case and judgment on a petition given solely against a respondent, the same process can be pursued in respect of a respondent; nor am I sure that it is sound law, that because a wife is mentally and physically weak, or if she were absolutely lunatic at the time of her adultery, this would be a complete answer to a suit by her husband against her. But, in the present case, the question is not as to the possibility of dismissing a wife from the suit, and maintaining the petition against the co-respondent. Here, there has been condonation, and the effect of the Act of 1857, s. 30, is that the petition must be dismissed, and so the case is governed by *Bernstein* v. *Bernstein, Sampson, and Turner*. (3) It must now be taken to be the law that, if a petition fails against a wife, it fails against the co-respondent just as completely as it fails against the respondent. I cannot, therefore, accede to the suggestion to keep the case alive as against the co-respondent. Moreover, it seems to me that the fact and circumstances of the condonation would have a very material bearing on the question of damages. If the husband

(1) (1887) 12 P. D. 196.
(2) (1884) 10 P. D. 174.
(3) [1893] P. 292.
(4) 15 P. D. 218.

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only lost his wife for a temporary period, that is quite another thing to losing her altogether: damages assessed on the one theory would obviously be quite different to damages assessed on the other theory. This question of the quantum of damages might, however, have been got over possibly by allowing a further inquiry as to damages with a view to the damages being estimated at their true value. This decree nisi must be rescinded, and the order against the co-respondent in respect to damages necessarily falls with it.

Then comes the question of costs, which is quite independent of damages. I see no ground why the co-respondent, who has been the sole cause of this trouble, should be relieved of his liability to pay costs. The fact that the husband has forgiven his wife may be a meritorious act on the part of the petitioner, but it certainly imports no merit to the co-respondent, and I see no reason whatever to relieve the co-respondent from any part of the costs. The ground of collusion now alleged in the affidavits filed on his behalf, and which I take as they stand, is too shadowy for me to proceed upon. It is a theory started by the co-respondent only at the last hour. He put forward no ground of defence whatever in the suit. Therefore, on the merits, he is out of Court, and I do not feel disposed to help him to escape from any portion of his liability for costs.

The intervention of the King's Proctor has succeeded. The decree nisi must be rescinded and the petition dismissed. He will have an order against the petitioner for the costs of the intervention, by means of which he has brought to the knowledge of the Court facts which could, in the usual course, be only brought before the Court in this way. The petitioner will, however, have leave to add these costs of the King's Proctor to the costs he is entitled to recover from the co-respondent, who is to remain liable to pay the petitioner's costs of suit up to the decree nisi.

Solicitors for petitioner: *Doyle, Devonshire & Woodhouse.*

Solicitors for co-respondent: *Armitage & Armitage, for S. H. Graham, Longton, Staffordshire.*

H. D. G.

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July 20, 21.

Admiralty—Collision—Damage—Tug and Tow—Third Vessel—Pilot Cutter lashed to Tow—Independent Duty of Tug to avoid Danger—Identification—Right of Tug to Towage Remuneration though debarred from Salvage.

Two tugs were towing a sailing vessel, in charge of a pilot, down the Bristol Channel, with a pilot cutter made fast to the sailing vessel, when, owing to the negligence of the tow and her tugs, the pilot cutter was sunk by collision with a schooner, which was also damaged. In an action by the owners of the pilot cutter against the owners of the schooner and the owners of the tugs, in which the owners of the schooner counter-claimed against the owners of the pilot cutter and the owners of the tugs:—

Held, by the President (Sir F. H. Jeune), following *The Altair*, [1897] P. 105, that the pilot cutter and the schooner were entitled to succeed against the tugs, for, though those in charge of the tow were negligent in not properly directing the tugs, an independent duty was cast upon the tugs to exercise reasonable care and skill in keeping clear of the schooner; and, further, following *The Bernina*, (1888) 13 App. Cas. 1, that the pilot cutter was not identified with the sailing vessel so as to be unable to recover.

After the collision one of the tugs towed the schooner to Cardiff, and claimed salvage remuneration:—

Held, that, though the tug was bound to stand by, and was debarred by her negligence from recovering salvage, she was not bound to tow the schooner to her port of destination, and was, therefore, entitled to payment on ordinary towage terms.

Actions of damage by collision and salvage.

In the damage action the plaintiffs were the owners of the pilot cutter *Emily*, and her master and crew proceeding for their lost effects. The defendants were the owners of the schooner *Harvest Home*, and the owners of the steam-tugs *Clarissa* and *Nora*.

In the salvage action the plaintiffs were the owners, master, and crew of the *Clarissa*, and the defendants were the owners of the *Harvest Home*, her cargo and freight.

The case is reported first on the question of the independent duty cast upon tugs, whilst towing a vessel in charge of a pilot, to keep clear of danger; secondly, as to the alleged identification of a pilot cutter with a vessel in tow alongside

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which she is lashed; and, thirdly, as to the right of a tug to towage remuneration although debarred by her negligence from salvage.

The material facts relating to the collision as set out in the pleadings were as follows:—

On March 14, 1904, about 11 P.M.—the weather being dark and overcast with rain and the tide the last quarter ebb of little force—the sailing ship *Moy* was in the Bristol Channel off the Nash Light. She had two tugs, the *Clarissa* on the starboard and the *Nora* on the port bow, towing her, with scopes of ninety fathoms on their tow-ropes, on a westerly course at a speed of about five knots. The *Emily*, a pilot cutter of eighteen tons register, manned by a crew of five hands, with no sail set, was made fast on the starboard bow of the *Moy*, and was being towed abreast of the starboard side of that vessel, waiting to take off the pilot. The *Moy* had her regulation sidelights, the tugs their regulation towing and side lights, and the *Emily* a white globe light at her masthead.

In these circumstances, the plaintiffs, the owners of the *Emily* and others, alleged that those in charge of that pilot cutter observed about one to two points on their starboard bow, and distant about three miles, a low white light, which (they alleged) proved to be the stern light of the *Harvest Home*, a schooner belonging to the port of Preston, of 102 tons gross register, from Londonderry to Cardiff with a cargo of burnt ore and a crew of four hands. The stern light gradually broadened on the starboard bow of the *Emily*, which continued to be towed on a westerly course and was overtaking the *Harvest Home*; but, when in a position to pass well clear to the southward of the *Harvest Home*, that schooner suddenly opened her red light and was seen to be standing to the southward on the port tack. As the *Harvest Home* was coming rapidly towards the *Emily*, causing danger of collision, fenders were put out between the *Emily* and the *Moy*, and the *Emily's* rope was ordered to be slipped; but before this could be done, the *Harvest Home* with her stem and port bow struck the starboard side of the *Emily*, cutting her in two and causing her to founder.

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The plaintiffs charged the *Harvest Home* with not keeping a good look-out, neglecting to keep clear of the *Emily*, neglecting to keep her course, and that she was improperly put and kept on the port tack. By amendment they alleged that the tugs *Clarissa* and *Nora* had the control of the navigation of the *Moy* and the *Emily*, and they added the further charges that the *Clarissa* and *Nora* did not keep a good look-out, and that they failed to keep the *Emily* clear of the *Harvest Home*.

By their amended defence and counter-claim, the owners of the *Harvest Home* alleged that their schooner was carrying the regulation lights for a sailing vessel under way, including a stern light, and was heading about S.E. to E.S.E., having little or no headway; that the masthead and green lights of the two tugs, and afterwards the green light of the *Moy*, were observed about a quarter of a mile distant, bearing from two to three points on the port bow of the *Harvest Home*; that the *Emily* was not exhibiting any light, and was not visible to those on board the *Harvest Home* until just before the collision; that the *Harvest Home* remained heading in the same direction; and that the tugs, with the *Moy* and *Emily* in tow, came on without taking any steps to keep clear of the *Harvest Home*, and passed close across her bows, with the result that the stem and starboard bow of the *Emily* struck the stem and port bow of the *Harvest Home*, doing her damage, and that the starboard side of the *Moy* also struck the bowsprit and forward parts of the *Harvest Home*, doing her further damage. They charged the *Emily* and the tugs with not keeping a good look-out, with neglecting to keep out of the way, and improperly attempting to cross ahead of the *Harvest Home*; and they charged the *Emily* with neglecting to exhibit the regulation lights for a vessel in tow, and with neglecting to slip her tow-rope. By their counter-claim the defendants, the owners of the *Harvest Home*, claimed "judgment against the plaintiffs, the owners of the *Emily* and their bail, and against the defendants, the owners of the *Nora* and their bail, for the amount of the damage."

By their defence, the owners of the *Clarissa* and *Nora* alleged

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that those on board their tugs observed, about one to two points forward of the beam on the starboard side, the red light of the *Harvest Home* about a quarter of a mile distant, and that the *Harvest Home* suddenly shut in her red light and opened her green, apparently acting under a starboard helm, and was seen to be standing to the southward on the port tack. They alleged that the *Emily* improperly neglected to slip her tow-rope, and they denied that either of their tugs had the control of the navigation of the *Moy*, as that vessel was under the directions of a compulsory pilot, to whose orders those in charge of the tugs conformed. By paragraph 6 they alleged that "the *Emily* was attached to the *Moy* for her own purposes, namely, to attend upon the pilot of the *Moy*, who was one of the crew of the *Emily*, and was in charge of the *Moy*. The *Emily* was so attached at her own risk. By paragraph 7 they alleged, alternatively to paragraph 6, that "the *Emily* was identified with the *Moy*, which was being towed upon the conditions following, namely, 'The owners and masters of vessels are requested to take notice that the steam-tug proprietors will not be responsible under any circumstances for damage or injury, however caused, occurring to vessels or their cargoes, or occasioned by such vessels while in tow of these tugs.'"

The direction and the force of the wind at the material time were disputed. According to the plaintiffs, the owners of the *Emily*, it had been calm about half an hour previously, but was then east, a moderate to fresh breeze. According to the defendants, the owners of the *Harvest Home*, it was calm with occasional light northerly airs. According to the defendants, the owners of the *Clarissa* and *Nora*, there was a strong N.E. breeze.

July 20. *Robson, K.C.*, and *D. Stephens*, for the plaintiffs, the owners of the *Emily*, and others. The *Harvest Home* had been becalmed heading westerly—that is, in the same direction as that in which the *Emily* was being towed; so that the *Harvest Home* would shew her stern light to the *Emily*; but a breeze sprang up from the eastward, and as the *Emily*, fast

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to the *Moy*, approached, the *Harvest Home* luffed, and, heading on to the port tack, ran into the *Emily* owing to not keeping a good look-out. For that the *Harvest Home* is to blame. Had the tugs not been negligent, they would have observed the improper action of the *Harvest Home*, and guarded against it in time by keeping the *Emily* clear. This they were bound to do, for tugs carrying out a contract of towage of this character do control the navigation. They do not wait for orders from the tow before taking steps to avoid obvious danger: *The Altair* (1); and it is not material whether the tugs received directions from the pilot of the *Moy* or not, for the *Emily* was entitled, with the *Moy*, to rely upon the exercise of reasonable care on the part of the tugs; see per Brett M.R. in *Heaven* v. *Pender*. (2) The tugs are, therefore, also to blame.

July 21. *Laing, K.C.*, and *Dawson Miller*, for the defendants, the owners of the *Harvest Home*. The white light alleged to have been seen by those in charge of the *Emily* did not belong and could not have belonged to the *Harvest Home*, for that vessel, under the influence of light northerly airs, was heading S.E. to E.S.E., whilst the *Emily* was heading about W., so that the stern light of the *Harvest Home* would not be visible to the *Emily*; and if the view put forward by the plaintiffs were correct, the *Harvest Home* would have been proceeding down channel instead of up. So also, if the place of collision indicated by the plaintiffs were correct, she must have gone in a very short time some considerable distance to the westward, although her course was to the eastward.

As the *Emily* was fast to the *Moy*, and being towed by the tugs, she was wrong in exhibiting the white globe light at her masthead: *The Mary Hounsell* (3); and it was the duty of the tugs to keep her clear of the *Harvest Home*, for it is not incumbent upon the pilot in charge of the tow to direct every movement of the tugs: *The Sinquasi*. (4) If the *Emily* had had a proper look-out she would have slipped the tow-rope in time:

(1) [1897] P. 105.
(2) (1883) 11 Q. B. D. 503, at p. 508.
(3) (1879) 4 P. D. 204.
(4) (1880) 5 P. D. 241.

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The Jane Bacon. (1) The *Emily* and the tugs are, therefore, to blame.

[*The Milan* (2) and *The Devonian* (3) were referred to.]

Aspinall, K.C., and *Bailhache*, for the defendants, the owners of the tugs *Clarissa* and *Nora*. The tugs did not have the control of the navigation, for a compulsory pilot was in charge of the vessel they had in tow, whose orders the tugs were bound to obey; so that if there were any negligence it is to be attributed to the *Moy* and not to the tugs; but, assuming that the tugs were called upon to take some step when the sudden action of the *Harvest Home*, in bearing down upon the *Emily* with a strong N.E. breeze, had made a collision imminent, it must be borne in mind that the position of the two tugs was difficult, for, with the *Moy* in tow, and the *Emily* fast to the *Moy*, they had not the same facility of movement as if unincumbered, and they could not by stopping or reversing their engines at once stop or back the vessels in tow: *The Lord Bangor.* (4)

Secondly, the tugs owed no duty to the *Emily*. They had not undertaken to tow her. She had attached herself to the *Moy* at her own risk. A member of her crew, namely, the pilot, was on board the *Moy* directing the movements of the tugs, and, having made fast, the *Emily* had identified herself with the *Moy*; so that any defence open to the tugs against the *Moy*, whether arising out of non-liability by contract or otherwise, is equally available against the *Emily*.

Robson, K.C., in reply. The case of *Thorogood* v. *Bryan* (5), establishing the doctrine of identification, was overruled in *The Bernina* (6), and the *Emily* cannot, therefore, be deemed identified with the *Moy* so as to be precluded from recovering against the tugs by reason of the negligence of the *Moy*, or by reason of the terms of any alleged contract between the tugs and the *Moy*. The question of the light carried by the *Emily* is immaterial, as those in charge of the

(1) (1878) 27 W. R. 35.
(2) (1861) Lush. 388.
(3) [1901] P. 221.
(4) [1896] P. 28.
(5) (1849) 8 C. B. 115.
(6) 13 App. Cas. 1.

Harvest Home admit that they did not see any light: *The Argo*. (1)

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THE PRESIDENT (SIR F. H. JEUNE). The main question which underlies and perhaps controls nearly the whole case is the question of the course of the *Harvest Home*. The difference between the two views put forward is considerable. According to the case of the *Emily*, the *Harvest Home*, although her destination was Cardiff, was going down the channel, or at all events moving down the channel, and then at a certain spot brought herself round and got herself to a heading of somewhere between E. and S.—E.S.E. or something of that kind; the whole point being that at first a white light on the *Harvest Home* was seen, so that the vessel was proceeding in a westerly direction. The story of the *Harvest Home* is essentially different. It is that she was becalmed, lying with her head E.S.E., and that she lay there with her head in that direction until the wind sprang up, when she proceeded on the same course. Those in charge of her deny that she was ever going W., and so shewing her stern light to the vessels coming down channel. I have carefully considered the case with the Elder Brethren, on the evidence and probabilities, and it seems to me clear that the story told by the *Harvest Home* is substantially the correct one. I cannot believe that the *Harvest Home* was proceeding down channel to the westward. So impossible does it seem to me that I cannot help thinking the white light which those on the *Emily* and the *Moy* say they saw may have been on some other vessel than the *Harvest Home*; though it is difficult to imagine even that, because there is no evidence of any other vessel being about at that time shewing such a light. I do not think I need go into all the reasons for coming to this conclusion. They have been dealt with by counsel for the *Harvest Home*, and I thought that their arguments on this part of the case were sound.

Then comes the question of speed. Having regard to the fact that we know the *Moy* was going five or six knots, to suppose under those circumstances that the *Harvest Home*

(1) (1900) 9 Asp. M. L. C. 74.

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could have got round and struck the starboard side of the *Emily* appears to me to be impossible. It is also a remarkable fact that the man on the *Clarissa* never saw any white light at any material time—that is, at the same time as those on the *Emily* and the *Moy* say they did—and he was in a position to do so. It is also remarkable that no evidence has been called from the *Nora*, and it is clear to me that no one on the *Nora* could substantially corroborate the story told by the *Emily* or the *Moy*. I think, therefore, I ought to come to the conclusion, without hesitation, that the account given by the *Harvest Home* is one which is substantially true.

That brings me to the next question, which is this: Supposing the *Harvest Home* was lying becalmed, heading E.S.E., with her helm lashed, and the wind springs up, then it is said that under those circumstances she ought not to have moved on her way, but should have stopped and waited until the flotilla had passed. I quite agree that there is a strong argument to be used against the *Harvest Home* in connection with that matter, because it is difficult to avoid the conclusion that the *Harvest Home* had a bad look-out. Those in charge of her say they only saw one white light with each of the towing steamers, and therefore they must have failed to see that they were carrying the ordinary towing lights. In those circumstances they may have been mistaken as to the true character of these vessels, and may have thought they were vessels proceeding down channel, and not vessels towing. I do not think that makes any material difference, however, because even if she had more perfect knowledge than she had I cannot bring myself to say that she did anything that was wrong. She was lying there becalmed, and the wind sprang up, and she naturally moved on. I do not see any reason why she should not do so in those circumstances. If the other vessels had seen her at the distance they might have done they should have kept out of her way, and this they undoubtedly did not do. They were to all intents and purposes all steamers, having perfect facility for keeping out of the way of the schooner. I think I may go further, and say that if they were coming down channel, and had seen, as I think they

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ought to have seen, this vessel at a considerable distance, then it was their duty to keep out of her way, and the fact that they did not see her and saw a white light shews, I think, that there was some bad look-out on their part. If they had seen, as they should have seen, the red light of the *Harvest Home* in the position in which they must have seen it, I do not think I am going too far in saying that they ought to have considered it was a sailing vessel, which, when the wind sprang up, might reasonably be expected to proceed on her course; and they should have taken care to give her as wide a berth as possible. In those circumstances I think no blame attaches to the *Harvest Home*. On the other hand, it seems equally clear that the tugs and the *Moy* were to blame for not keeping out of the way of the *Harvest Home*. I do not think it is necessary for me to discriminate between the *Moy* and the tugs, because the *Emily* brings her action against the tugs and not against the *Moy*. If, as I think, both the tugs and the *Moy* were to blame, then the *Emily* is entitled, as far as this point is concerned, to maintain her action against the tugs. I think it is clear that the tugs had a sufficiently independent position for me to say that it was negligence on their part not to have kept out of the way. The case of *The Altair* (1), I think, is quite sufficient to shew that the tugs had a duty of their own. It is quite true that they had to obey the orders of their tow, but the case of *The Altair* (1) and other authorities shew that the tugs had that amount of independent duty—that they were bound to keep out of the way and exercise independent action to keep out of the way, although it may be that their tow was also negligent in not communicating orders to them; but I need not go into that, because there is no action against the *Moy*, and no action by the *Moy* against the tugs.

It is said, however, that the *Emily* cannot maintain her action against the tugs because she was lashed to the *Moy* and therefore was identified with the *Moy*, and if the *Moy* is negligent the *Emily* has to share the consequences of that negligence. That might have been so, I think, at one time,

(1) [1897] P. 105.

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but the view of the law has altered in a very material respect as to the question of identification of persons on the wrong-doing ship with the ship herself. Having regard to the case of *The Bernina* (1), it is clear that there is an independent right of persons, whether on an omnibus or a ship, against a wrong-doer, even though those directing the omnibus or ship they are on may be guilty of negligence. It is, therefore, no answer to say to the *Emily*, "You were lashed to the *Moy* and the *Moy* was in fault." I am, therefore, of opinion that nothing is to be said against the *Emily* on that ground.

There is another matter which I have had to consider carefully with the Elder Brethren. That is the question of the *Emily's* failing to slip her rope. The fact is that the *Emily* had no man stationed at the tow-rope or lashing for the purpose of slipping it, and the effect was that the *Emily* did not slip her tow-rope or lashing-rope at the earliest possible moment; but in the end the master did give an order to that effect when it was too late to produce any real result. I think that raises a very difficult question, and it is whether or no it was negligence, and, if so, what sort of negligence, on the part of the *Emily*, not to have slipped her rope. Although on the one hand it may be said that if she had slipped her rope at one time she would have got clear and could then have hoisted her sail and got away, on the other hand it may be said that if she had cut herself adrift from the *Moy* she would be losing her chance of being towed past the approaching vessel and so reaching safety. It may also be said that if she dropped astern of the *Moy* she might have put herself in the way of the approaching vessel if the approaching vessel tried to go under the stern of the *Moy*. The question is a difficult one, and although my own opinion about the matter, after consultation with the Elder Brethren, is that it would have been better, on the whole, to have slipped at an earlier time, and that if a man had been stationed, as I think he should have been, at the rope, it would have had more satisfactory consequences than in fact ensued, still it is a question of doubt and difficulty, about which opinions may very well be divided.

(1) 13 App. Cas. 1.

Therefore I feel unable to say that there was any such want of ordinary care and skill on the part of the *Emily* as would deprive her of the right to bring an action, and still more that there was that amount of negligence which would entitle the *Harvest Home* to bring an action against her. The result is that the *Emily* is entitled to maintain her action against the tugs for their negligence, but not to maintain her action against the *Harvest Home*; the *Harvest Home* is entitled to maintain her counter-claim against the tugs—I think she has brought her action only against one tug, but that is immaterial, because they belong to the same owners—but is not entitled to succeed against the *Emily*.

On the question of costs—

Dumas, for the plaintiffs, the owners of the *Emily*. The owners of the tugs not only denied any negligence on the part of the tugs, but threw the blame on to the *Emily*. As they have been found alone to blame, they should be condemned, not only in the costs of the plaintiffs, but in those arising out of the defence by the *Harvest Home* to the claim of the *Emily*, as was done in the case of *The Mystery* (1), following *The River Lagan*. (2)

THE PRESIDENT. Those decisions, so far as they deal with the question of costs, do not apply to the circumstances of the present case. The costs will follow the result in the usual way.

After the collision between the *Harvest Home* and the *Emily* and *Moy*, the *Clarissa* towed the *Harvest Home* from about five to six miles off Nash Point, in about eight hours, to Cardiff, and the owners, master, and crew of the *Clarissa*—which is a screw tug of ninety-three tons register, engines of 300 horse power indicated, and a crew of six hands—claimed salvage remuneration or, in the alternative, 25*l*. for towage services, alleging that the *Harvest Home* was in a helpless

(1) [1902] P. 115. (2) (1888) 6 Asp. M. L. C. 281.

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condition, with her stem started and her bowsprit and headgear carried away.

By their defence and counter-claim the defendants, the owners of the *Harvest Home*, her cargo and freight, denied that salvage services had been rendered to the *Harvest Home* by the plaintiffs, the owners of the *Clarissa*, and, alternatively, alleged that "if the said alleged services were salvage services the defendants say that the same were rendered necessary by reason of the negligence of the plaintiffs or some of them as hereinafter appears, and, in the circumstances, the plaintiffs are not entitled to salvage or towage remuneration for the said services. The defendants rely on the Merchant Shipping Act, 1894, s. 422." (1) The defendants then dealt with the facts relating to the collision already set out in the report of the damage action, and alleged that (paragraph 10), "After the collision a light breeze having sprung up from the eastward the wreckage was cleared away and the *Harvest Home* . . . . was put on a course for Cardiff, and was able to make about three knots an hour. About 11.45 P.M. the tug *Clarissa* returned and offered to tow the *Harvest Home* to Cardiff and dock her. The master of the *Harvest Home*, who required a tug for docking, agreed, and passed his hawser on board the tug. The tug then towed the *Harvest Home* to Cardiff, arriving in Penarth Roads at 4 A.M. next morning, and at 6 A.M. the *Harvest Home* was docked. During the towage the wind was light to moderate. (Paragraph 11:) The said services were ordinary towage services. The *Harvest Home* had lost her bowsprit, but was in other respects perfectly seaworthy. She was making no water, and was able to proceed under her own sails without assistance. She only required a tug for docking. The *Clarissa* incurred no difficulty

(1) 57 & 58 Vict. c. 60, s. 422: "(1.) In every case of collision between two vessels, it shall be the duty of the master or person in charge of each vessel, if and so far as he can do so without danger to his own vessel, crew, and passengers (if any),

"(*a.*) To render to the other vessel her master crew and passengers (if any) such assistance as may be practicable, and may be necessary, to save them from any danger caused by the collision, and to stay by the other vessel until he has ascertained that she has no need of further assistance. . . ."

or danger in rendering the services. The ordinary rate for the towage service and docking for a vessel of the size and description of the *Harvest Home* is not more than 5*l.* 5*s.* (Paragraph 13:) Alternatively the defendants, whilst denying liability, bring into court the sum of 5*l.* 5*s.*, which sum is sufficient to satisfy the plaintiffs' claim, if any, herein."

The value of the *Harvest Home* was 500*l.*, her cargo 121*l.* 17*s.* 9*d.*, and freight 10*l.*—total, 631*l.* 17*s.* 9*d.*

Aspinall, K.C., and *Bailhache*, for the plaintiffs, the owners of the *Clarissa*. The services rendered by the *Clarissa* cannot be deemed "ordinary towage services" as alleged in their defence by the owners of the *Harvest Home*, for, in the words of Dr. Lushington in *The Reward* (1), "mere towage service is confined to vessels that have received no injury or damage, and . . . . mere towage reward is payable in those cases only where the vessel receiving the service is in the same condition she would ordinarily be in without having encountered any damage or accident."

Laing, K.C., and *Dawson Miller*, for the owners of the *Harvest Home*, her cargo and freight.

THE PRESIDENT (SIR F. H. JEUNE). What I have said in regard to the collision action disposes of the question of salvage, because, apart from whether it can be considered salvage at all, which I very much doubt, it is quite clear the tug cannot maintain an action for salvage, having been held to blame for the collision.

The question of towage, however, appears to remain, because even if the tug were guilty of negligence in bringing about the state of things, I do not think—although there is a duty to stand by—it would result in there being a duty on the part of the tug to tow the vessel to Cardiff, or wherever she wished to be towed. Therefore, although she is not entitled to salvage, I think she is entitled to towage remuneration. There is some question as to what the amount of the towage remuneration ought to be. There is a tariff for a certain distance, and

(1) (1841) 1 Wm. Rob. 174, at p. 177.

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beyond that the matter is one of a simple towage, because the vessel was not in any real danger. I have no doubt she could perfectly well have sailed herself if it was imperative she should do so. I think that the sum of 5*l.* 5*s.* which has been paid into court is sufficient. The tender will, therefore, be upheld, and the defendants succeed on their counter-claim, with costs.

Solicitors for plaintiffs, owners of the *Emily*, and others: *Holman, Birdwood & Co.*, for *James Inskip & Co., Bristol.*

Solicitors for defendants, owners of the *Harvest Home*: *Downing, Handcock, Middleton & Lewis*, for *Downing & Handcock, Cardiff.*

Solicitors for owners of the *Clarissa and Nora*: *Stokes & Stokes*, for *Lloyd & Pratt, Cardiff.*

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Aug. 1, 8.

THE ELMVILLE (No. 2).

Admiralty—Master's Wages—Extra Wages — Emoluments—Disbursements—Liabilities — Maritime Lien — Costs of defending Action on Bill of Exchange—Merchant Shipping Act, 1894 (57 & 58 *Vict. c.* 60), *ss.* 167, 742.

The costs incurred by a master in unsuccessfully defending an action on a dishonoured bill of exchange drawn by him on his owners for the price of coals supplied to the ship will not be deemed "liabilities properly incurred by him (as master) on account of the ship" within the meaning of s. 167 of the Merchant Shipping Act, 1894, unless the defence was reasonably necessary in the interests of the ship.

The term "wages" in s. 167 will include a bonus of 50*l.* promised to a master by his owners during a voyage, in addition to his agreed wages, on condition that he remained with the vessel, and satisfied his owners that he had done all in his power to promote the interests of the ship.

MOTIONS in objection to the registrar's report after a reference in an action in rem by the master of the steamship *Elmville* for wages and disbursements.

By the first motion the master sought to vary the report so far as it disallowed the costs of unsuccessfully defending an action on a bill of exchange drawn by him on his owners for coals supplied to the vessel. The second motion raised the

question whether the master was to be allowed to claim in his accounts, in priority to mortgagees of the vessel, a bonus of 50*l.* by way of extra wages.

The facts, so far as material, were shortly as follows:—

On December 8, 1903, an agreement was entered into by the owners of the steamship *Elmville*, as buyers, and the agents of suppliers of coal at Colombo, as sellers, under which the steamer was supplied with bunker coal to the value of 270*l.*, and disbursements were made on account of the master and owners for harbour dues, pilotage, and other necessaries, amounting to 33*l.* 19*s.*, in respect of which two sums the master, in accordance with the agreement, drew a bill of exchange on his owners for 303*l.* 19*s.* payable in London to the order of the suppliers.

The bill was dishonoured at maturity, and on April 23, 1904, the holders issued a writ against the master, as drawer, for the amount of the bill. On April 29 mortgagees of the vessel commenced an action for principal and interest amounting to 6546*l.* 10*s.* 5*d.*, and on the same day the master of the *Elmville* instituted an action for 550*l.* in respect of wages, and also for disbursements made by him on account of the steamer, including the bill of exchange for 303*l.* 19*s.*, for which he alleged he was or might be held liable as drawer.

On June 13 judgment was pronounced by default in the mortgagees' action subject to a reference, all questions of priority being reserved, and the vessel ordered to be sold by the marshal. On June 20 judgment was given by default in the master's action subject to a reference and to priorities. On June 25 the holders of the bill of exchange obtained judgment against the master for 303*l.* 19*s.*, together with interest from the date of dishonour and costs.

At the reference in the master's action the sums of 303*l.* 19*s.* and 2*l.* 16*s.* 6*d.*, principal and interest, were allowed; but the plaintiffs' costs, for which the master had become liable, amounting to 66*l.* 16*s.* 2*d.*, together with his own taxed costs, in respect of the defence of the action on the bill of exchange, were disallowed by the registrar, whilst the sum of 50*l.* for extra wages was allowed him in addition to 182*l.*, the amount

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of the wages originally agreed to be paid him by the owners of the ship. In respect of this item a letter, dated July 8, from the managing owners of the *Elmville* to the solicitors of the mortgagees, contained the following passage: "Our arrangement with Captain Goodrich was that he should receive 50*l.* bonus if he remained in the ship and returned with her to England, and we were satisfied that he did all in his power to promote the ship's interest. These conditions he has complied with, and we, therefore, think he is entitled to the promised amount."

Aug. 1. *Balloch* and *Dumas*, in support of the motion on behalf of the master of the *Elmville*. The registrar should not have disallowed the costs incurred by the master in defending the action brought against him by the holders of the bill of exchange, for such costs were disbursements or liabilities properly made or incurred by the master on account of the ship. A master has a maritime lien for his disbursements, and under the word "disbursements" in s. 10 of the Admiralty Court Act, 1861 (24 Vict. c. 10), is included a liability to satisfy such a judgment as that now existing against the master: *The Fairport*. (1) In that case the claim by the master included the costs, and was allowed. By the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 167, "liabilities" on account of the ship are now expressly included in the lien to which the master is entitled. The question whether the master was liable as drawer of the bill was doubtful. There were two defences: first, that due notice of dishonour had not been given; and, secondly, that by the terms of the bill the master did not incur personal liability. Gorell Barnes J., in deciding that the master was liable, said: "He" (the master) "is really defending this action, because if he is made liable he will have a right to recover against the ship; but if he is not liable and had not fought the case, it might be said in his suit against the ship, 'You ought to have fought this action, and you cannot claim'": *The Elmville*. (2) It is in evidence that the owners as well as the mortgagees of the vessel pressed the master to

(1) (1882) 8 P. D. 48. (2) Ante, 319, at p. 329.

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defend this action, and, therefore, the observations of Lord Ellenborough in *Spurrier* v. *Elderton* (1) do not apply to this case, for the master was not defending the action "of his own wrong and without authority." The defence was, therefore, in the circumstances reasonable, and the costs are recoverable: see *Hammond* v. *Bussey*. (2)

D. Stephens, contra. The disallowance of the costs incurred in defending the action was right, as the master did not act reasonably in contesting his liability on the bill. The ship derived no benefit, and the fund at the disposal of the Court for distribution cannot be reduced by the amount of these costs as against those next entitled.

Cur. adv. vult.

Aug. 8. THE PRESIDENT (SIR F. H. JEUNE). It appears to me that this case is substantially covered by authority. The question is whether the master is entitled to claim, not only the actual disbursements which he has made in the ordinary sense of the word, but the costs which he has incurred in an action on a bill of exchange to which he was a party. I do not think any question arises about this being a disbursement within the meaning of s. 10 of the Act of 1861, because although the money has not been actually spent, still I think if it was all proper expenditure made by the master of the ship it would fall within that definition. I think the case of *The Feronia* (3) covers the principle upon which this case is to be decided, and would cover the costs for which the master was liable, although he has not actually paid them, if they were, when paid, within the terms which were considered in that case to be disbursements. *The Feronia* (3) laid it down in broad terms that all proper expenditure made by the master, as master of the ship, were to be considered as disbursements within the meaning of the Act. In the subsequent case of *The Orienta* (4) I had occasion to consider this matter somewhat fully. The question there really was whether the liability was a liability incurred in terms by the master in his office as master, or merely by his

(1) (1803) 5 Esp. 1.
(2) (1887) 20 Q. B. D. 79.
(3) (1868) L. R. 2 A. & E. 65.
(4) [1895] P. 49.

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being the drawer of a bill at the request of his owners, irrespective of his being master. The Court of Appeal agreed with me in the view I took, and the judgment given by Lord Esher puts the matter very simply. He says: "For a century or more it has been common knowledge that the master is only authorized to pledge his owner's credit for what may be called 'things necessary' for the ship; that is to say, he can pledge his owner's credit if he is in a position where it is necessary, for the purposes of his duty, that these things should be supplied, and he cannot have recourse to his owners before ordering them, just as he can give a bottomry bond on the ship where the necessity arises in the sense which I have just stated. But then there came these Acts of Parliament, which say he should have a lien for disbursements. Now, if he should have a lien upon the ship, then the ship is bound to him; but the master cannot bind the ship to himself by ordering goods which he was not authorized to order at all, so as to pledge his owner's credit for them. The real meaning of the word 'disbursements' in Admiralty practice is disbursements by the master, which he makes himself liable for in respect of necessary things for the ship, for the purposes of navigation, which he, as master of the ship, is there to carry out—necessary in the sense that they must be had immediately—and when the owner is not there, able to give the order, and he is not so near to the master that the master can ask for his authority, and the master is therefore obliged, necessarily, to render himself liable in order to carry out his duty as master. Here no disbursements were made by the master; no goods were ordered by the master at all; no liability was incurred by the master in respect of these goods. He is not liable for the price of the coals, though it may be that the bill is drawn for the exact price. What he has done is, at the request of his owners, to make himself drawer of the bill of exchange which the owners were to accept; but it does not make the master liable to anybody unless the owners dishonour the bill when it becomes due and the proper notices have been given. That is not a liability in respect of the coals—that is a liability in respect of the bill of exchange. It is not a liability incurred

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by him in his office as master, but by his being the drawer of the bill at the request of his owners irrespective of his being master."

That appears to me to govern the principle in this case. Being the master, he drew the bill by way of payment for the coals which he knew the ship had received, and in considering the question whether he was justified in defending the action or making the ship liable for the costs of that defence, I have to consider whether it was necessary in the interests of the ship to have defended that action. There my difficulty arises, because I do not see why it was. He might perfectly well have allowed judgment to go by default, knowing that he could recover from the ship, and that he had a lien. I do not think there was any real defence. He acted as an individual and not as master of the vessel, and even if there was some sort of request to him by the owners and mortgagees to defend, I do not think that request was addressed to him as master of the vessel for the purposes of the vessel, but addressed to him on account of the accident of his being a party to the bill of exchange, in which the owners were interested. To use the words of Lord Esher, the liability incurred by him in respect of costs was not a liability incurred by him in his office as master, but by his being the drawer of the bill at the request of his owners, irrespective of his being master. I think, therefore, that the master cannot have the costs of this action against the ship.

Motion dismissed with costs.

D. Stephens, in support of the motion on behalf of the mortgagees of the vessel to strike out from the master's accounts the sum of 50*l.* alleged to be extra wages. The term "wages" is used in s. 167 of the Merchant Shipping Act, 1894, in a wide sense, and by s. 742 of the same Act "wages includes emoluments"; but the meaning of either of these words cannot be stretched to the extent of giving a master a lien on the vessel in respect of this gratuity promised him by the managing owners if he brought the vessel safely home to this country

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from Australia, where she was trading, for the master was bound to do so under his contract of service without the bonus. No doubt a reasonable sum for services outside the contract might be regarded as an emolument and be favourably considered by the Court, and it may be that the master is entitled to this sum as against the owners in personam, but not as wages recoverable under the statute out of the proceeds of the ship in priority to mortgagees. [Reference was made to *The Sara.* (1)]

Dumas (*Balloch* with him), contra. The decision of the registrar in allowing, in the master's accounts, this sum of 50*l.* as extra wages was right, for the amount comes either under the head of wages or emoluments, and may be regarded as deferred wages contingent on the master remaining in the vessel and performing his duties to the satisfaction of his owners. In *The Tergeste* (2) a victualling allowance was held to be equivalent to wages, and to carry a maritime lien.

THE PRESIDENT (SIR F. H. JEUNE). I am not quite sure whether this sum ought to be considered as conditional wages or as an emolument. I am rather inclined to think it is conditional wages—conditional upon the master standing by the ship and bringing her home in safety. If it is not wages, I am satisfied it is an emolument; but I should rather call it wages, because that word is used in the Act in a large sense so as to include, not only what a master gets as a wage, but what he obtains in the course of his service as recompense for the execution of his duty. I think, therefore, the master is entitled to treat this 50*l.* as part of his wages within the Act. The report of the registrar will be affirmed, and this motion dismissed with costs; but the costs will be set off against those in the previous motion.

Solicitors for master of the *Elmville*: *Stokes & Stokes.*

Solicitors for owners and mortgagees of the *Elmville*: *Williamson, Hill & Co., for Ingledew & Co., Cardiff.*

(1) (1889) 14 App. Cas. 209. (2) [1903] P. 26.

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DESERTION — *Condonation — Effect — Summary Jurisdiction (Married Women) Act*, 1895 (58 & 59 *Vict. c.* 39).

The effect of condonation of an offence which is specified as a ground of complaint within the terms of the Summary Jurisdiction (Married Women) Act, 1895, does not depend on the

DESERTION—*continued.*
wording of any section of that Act, but on the common law.

Therefore, where a wife complained of desertion within the meaning of that Act, and, during an adjournment of the hearing of the summons, resumed cohabitation with her husband, and subsequently, but before the date appointed for the adjourned hearing, separated from him again and obtained an order for separation and an allowance for maintenance:—

Held, that the order must be discharged, as the condonation by voluntary resumption of cohabitation had blotted out the cause of complaint, and there was nothing for the justices to adjudicate upon at the date of the order. WILLIAMS *v.* WILLIAMS - - - - **Div. Ct. 145**

2. —— "*Desertion*"—*Summary Jurisdiction (Married Women) Act*, 1895 (58 & 59 *Vict. c.* 39), *ss.* 4, 5 (*a*)—*Matrimonial Causes Act*, 1857 (20 & 21 *Vict. c.* 85), *ss.* 27, 31—*Misconduct, on part of Complainant, short of a Matrimonial Offence—Ground for Cessation of Cohabitation—Husband and Wife.*

"Desertion" under the Summary Jurisdiction (Married Women) Act, 1895, means, and is to be interpreted and dealt with as meaning, the same as desertion under the Matrimonial Causes Act, 1857, save that no period is specified as requisite to constitute the offence. FROWD *v.* FROWD **Div. Ct. 177**

—— Finding of desertion—Costs—Set-off—Refusal of decree of judicial separation **382**
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DISCRETION — Divorce — Discretional bar — Adultery of petitioner - - **149**
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—— Notaries—Discretion of Master of Faculties as to appointments in Colonies—Costs
See NOTARY. **180**

DISUSED BURIAL GROUNDS—Irrevocability of faculty except for fraud—Jurisdiction
See ECCLESIASTICAL LAW. 3. **1**

DIVORCE — *Petition — Unfounded Charges of Cruelty and Adultery—Finding of Desertion—Immateriality—Refusal of Decree of Judicial Separation—Costs—Set-off.*

Upon a wife's petition for dissolution of marriage, the charges of cruelty and adultery were negatived by a jury and held by the Court to be without foundation. The jury, in regard to a supplemental petition alleging desertion for two years and upwards, found that desertion was established as from February, 1901, whereas the petitioner's case put the desertion as having commenced when the parties ceased living together in July, 1900. The jury, from their finding on the other issues, appeared to have believed the respondent's and disbelieved the petitioner's case.

Upon the petitioner's application for a decree of judicial separation:—

Held, that, inasmuch as the parties, at the date when desertion was found by the jury to

DIVORCE—*continued.*
have commenced, had been living apart for some time, the finding of desertion at the later date was bad in law and immaterial for the Court to consider; that the petitioner was not entitled to a decree; and that the petition and supplemental petition must be dismissed.

The filing and prosecution of a suit for dissolution of marriage (or *quære*, for judicial separation) precluded the petitioner from successfully pleading that the period of desertion was running during the time while the suit was being maintained.

Upon the question of costs:—

Held, that the petitioner was entitled to the costs of the issue of desertion, but to no costs on the other issues, and that the respondent was entitled to set off, pro tanto, against his costs of these other issues, the costs to which the petitioner was held entitled in regard to the issue of desertion. KAY *v.* KAY - **Gorell Barnes J. 382**

2. —— *Practice—Contempt—Person in Contempt — Right of Hearing — Married Woman — Separate Estate — Restraint on Anticipation — Power to order Payment of Costs—"Proceeding instituted"—Married Women's Property Act*, 1893 (56 & 57 *Vict. c.* 63), *s.* 2.

The general rule that a person who is in contempt cannot be heard to make any application to the Court applies primâ facie to voluntary applications by him—i.e., when he comes to the Court asking for something.

The rule does not prevent a person who is in contempt from appealing against an order, made after the contempt was committed, on the ground that the order was made without jurisdiction.

Per Cozens-Hardy L.J.: Whether for this purpose there is in principle any sound distinction between contempt committed before and contempt committed after the order which the person in contempt seeks to challenge, *quære*.

The decree nisi for the dissolution of a marriage on the ground of the wife's adultery directed that the child of the marriage should remain in the custody of the husband until further order, and should not be removed out of the jurisdiction without the sanction of the Court. At that time the child was with the wife out of England, and on the same day an order was made ex parte in chambers that the child should be forthwith delivered up to the husband, and should remain in his custody until further order. After the decree nisi had been made absolute the wife, who had in the meantime married the co-respondent, came to England with the child. She then took out a summons asking that the decree nisi and the ex parte order might be varied by entrusting the custody of the child to herself. Pending the hearing of this summons the wife by her counsel gave an undertaking not to remove the child out of the jurisdiction without the consent of the Court. On March 10, 1903, the President ordered that the summons be dismissed and that the wife should pay the husband's costs, those costs to be payable out of her separate property, notwithstanding that it was subject to a restraint on anticipation. It was further ordered that the child should be forthwith delivered up by the

wife to the husband, and should remain in his custody until further order.

Immediately after this order was made it was found that the wife had sent the child out of England two or three days previously, and had herself followed on the day on which the order was made. She had since remained out of the jurisdiction with the child. On March 12 the President pronounced the wife in contempt for breach of her undertaking, and ordered her to be attached for her contempt, and another order was made the same day for her committal for her contempt in non-compliance with the ex parte order that the child be not removed out of the jurisdiction. On May 12 the wife gave notice of appeal from so much of the order of March 10 as directed the payment of costs out of her separate property, notwithstanding that it was subject to a restraint on anticipation. It was alleged that under the circumstances the Court had no jurisdiction under s. 2 of the Married Women's Property Act, 1893, to make the order as to the payment of the costs:—

Held, that, notwithstanding her contempt, the appellant was entitled to be heard:

Held, also, that the summons was not a "proceeding instituted by" the wife, within the meaning of s. 2 of the Married Women's Property Act, 1893, but was a step in the divorce suit, and that consequently there was no jurisdiction under that section to make an order for payment of costs out of the separate property subject to a restraint on anticipation.

The order was accordingly discharged. GORDON *v.* GORDON - - - - **C. A. 163**

3. —— *Practice—Garnishee Proceedings—Choses in Action—Debts owing or accruing—Attachment before date when Debts are payable—Orders for Wife's Support and Costs—Official Appointments of Respondent—Fees earned—Assignment defeating individual Creditor—13 Eliz. c. 5—Payment by Garnishee after Notice of Order Nisi—Cheque—Duty to stop Payment—Garnishee Orders Nisi made absolute.*

The principles involved in garnishee proceedings arising out of decrees and orders in matrimonial suits examined and considered

Garnishee orders nisi in respect of sums due or accruing due to the respondent, a medical man, on contracts in respect of his position as public vaccinator and as registrar of births and deaths, made absolute for payment of sums due to the petitioner (his wife) under orders of the Divorce Court for her support and for costs of proceedings in that Court.

A public vaccinator earned fees under a contract which specified that he should perform certain ministerial acts before becoming entitled to payment of his fees:—

Held, that the fees were debts accruing due so as to be attachable as soon as the work was performed, even though the contract specified a future date for actual payment.

The Registration Acts prescribe that the accounts of registrars are to be vouched by the superintendent registrar of births and deaths:—

Held, that the fees earned by a registrar in respect of births and deaths actually registered

were debts accruing due so as to be attachable before the accounts had been vouched or time for payment had arrived.

Although at the date of garnishee proceedings an assignment by a judgment debtor may not have been executed or even assented to by the assignee, the assignment may, nevertheless, be valid against the claims of the judgment creditor, provided that the assignee afterwards assents to and executes the deed of assignment, whereupon the validity of the deed relates back to the date of its execution by the assignor.

An assignment of choses in action, since these became subject to attachment by the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), ss. 60 et seq., may be void under the statute of Elizabeth (13 Eliz. c. 5), as tending to defeat, hinder, or delay creditors.

If one particular creditor only is, in effect, though not necessarily intentionally, defeated, hindered, or delayed by an assignment executed by the judgment debtor, such assignment may be void under the statute of Elizabeth as tending to defeat, hinder, or delay creditors.

If a garnishee has already made payment to the judgment debtor by cheque before notice of a garnishee order nisi, he is, upon receiving notice, under no legal obligation to stop payment of the cheque. EDMUNDS *v.* EDMUNDS

Gorell Barnes J. 362

4. —— *Practice—Husband's Petition—Decree Nisi—Damages and Costs against Co-respondent—Subsequent Condonation—King's Proctor's Intervention—Effect of such Condonation on Order for Damages and Costs.*

The effect of condonation of a wife's adultery by her husband, after decree nisi and before decree absolute, considered.

If a petition is dismissed by reason of condonation it is dismissed for all purposes, and cannot be kept alive temporarily for the purpose of enabling a petitioner to recover damages which have been awarded against a co-respondent in the suit, but the co-respondent may still be held liable for, and may be ordered to pay, the costs of the suit, which, on the intervention of the King's Proctor and by reason of condonation subsequent to decree nisi, has been dismissed.

The petitioner, in such a case, may be ordered to pay the costs of the King's Proctor's intervention, but he may add the amount of these costs to the costs which he is still held entitled to recover from the co-respondent.

Long v. *Long and Johnson*, (1890) 15 P. D. 218, doubted. HYMAN *v.* HYMAN AND GOLDMAN

Jeune Pres. 403

5. —— *Settlements, Variation of—Answer to Petition before Decree Absolute—Lis Pendens—Practice—Matrimonial Causes Act*, 1859 (22 & 23 *Vict. c.* 61), *s.* 5.

A petitioner who has obtained a decree nisi for dissolution of marriage cannot proceed with a petition to vary settlements until the decree has been made absolute; and nothing done between the time when the decree is made absolute and the hearing of the petition to vary can affect the power of the Court to vary the settlements. CONSTANTINIDI *v.* CONSTANTINIDI AND LANCE **C. A. 306**

DIVORCE—*continued.*

6. —— *Settlements, Variation of—Child—Question of Legitimacy—Issue directed.*

On a petition for variation of settlements after a decree for dissolution of marriage, where a child has been born between the date of the decree nisi and decree absolute, the paternity of which the petitioner denied, the Court, on the application of the petitioner, directed an issue to be tried to ascertain the status of the child, and postponed the further consideration of the variation of settlements until after the trial of the issue.

In the Matter of the Petition of Chaplin, (1867) L. R. 1 P. & M. 328, *Pryor* v. *Pryor and Shelford*, (1887) 12 P. D. 165, and *Douglas* v. *Douglas and Trevor*, (1898) 78 L. T. 88, discussed. EVANS *v.* EVANS - - **Gorell Barnes J. 274**

7. —— *Settlements, Variation of—Hearing of Issue as to Legitimacy of Child—Proceeding not instituted in consequence of Adultery—Co-respondent in Divorce Suit—Competent and compellable Witness on Issue as to Status of Child.*

Upon the hearing of an issue, which had been directed for the purpose of determining the status of a child born of the respondent during wedlock, the co-respondent in the former proceedings was called as a witness by the petitioner, and a question was put to him as to adultery between him and the respondent:—

Held, that he was bound to answer the question. EVANS *v.* EVANS AND BLYTH **Gorell Barnes J. 378**

8. —— *Wife's Suit—Decree Nisi—Intervention—Adultery of Petitioner—Discretional Bar—Matrimonial Causes Act*, 1857 (20 & 21 *Vict. c.* 85), *s.* 31—*Decree rescinded and Petition dismissed.*

In order that the Court should exercise the discretion conferred by the 31st section of the Matrimonial Causes Act, 1857, in favour of a petitioner guilty of adultery, it is not enough that the petitioner's misconduct was more or less pardonable or capable of excuse, but the Court must find, as a fact, that the petitioner's misconduct was caused directly by the matrimonial offence or offences of the respondent.

Constantinidi v. *Constantinidi and Lance*, [1903] P. 246, distinguished. WYKE *v.* WYKE **Bucknill J. 149**

—— Desertion.
See under DESERTION.

DOCK—Collision—Powers of dock-master—Vessel coming out of dock into river - **100**
See SHIPPING. 12.

DOMICIL—Foreign domicil, will, and marriage—English domicil subsequently acquired
See PROBATE. 2. **269**

ECCLESIASTICAL LAW—*Citation in Civil Suit to appear and shew Cause why a Monition should not issue to remove Ornaments introduced into Parish Church without a Faculty—Allegation of Interest—Insufficiency of Interest—Secretary of Archbishop—Sequestrator during Vacancy of Benefice.*

The churchwardens of a parish in the diocese of York, the incumbency of which was vacant by the resignation of the last incumbent thereof, were cited to shew cause why a monition should not be issued calling upon them to remove out of the parish church certain ornaments introduced there without the authority of a faculty. The promoter in the suit was not a parishioner of the parish, but was described in the citation as "Thomas Shepherd Noble, of the city of York, solicitor, secretary to His Grace the Archbishop of York and Ordinary of the Diocese of York." It further appeared, by evidence at the hearing, though not disclosed on the face of the citation, that the promoter had been appointed and was at the time when the citation issued sequestrator of the living during the vacancy:—

Held, that the suit must be dismissed, as the promoter had not the interest required by law to entitle him to promote the suit.

Lee v. *Fagg*, (1873) L. R. 4 A. & E. 135; (1874) L. R. 6 P. C. 38, followed. NOBLE *v.* REAST **Consist. Ct. of York. 34**

2. —— *Faculty for the erection of Communion Table constructed of Wood and mounted on castors but with the front and sides covered with detachable frames of Slate containing Marble Mosaics—Church Furniture—Canon 82 of 1604—"Carpet of Silk or other decent Stuff."*

A movable marble Communion Table is not a legal article of Church furniture; but a faculty may, in the discretion of the Ordinary, be granted for a movable wooden Communion Table, on the front and sides of which are suspended slabs of slate decorated with marble mosaics and detachable at will without damage to the Table.

The rector and one of the churchwardens of a parish church, who had petitioned the Chancellor of the diocese for a faculty for the introduction into the chancel of the church of a movable Communion Table of marble, by leave of the Court brought in a supplementary petition whereby they prayed that, instead of a faculty being granted for the Communion Table proposed by their original petition, they might be authorized to place in the chancel of the church a movable Communion Table of wood standing on castors, with licence to suspend by wooden screws on the front and sides of the table thin slabs of slate decorated with marble mosaics. The prayer of this supplementary petition was not opposed; and at the hearing of the suit it appeared that the proposed decorated slabs of slate would be detachable at will without damage to the table and be in keeping with the decorations of the rest of the chancel, and that the whole of the surface of the proposed table would be of wood, and no marble mosaic of any kind would rest thereon:—

Held, that a faculty could be granted authorizing the proposed wooden Communion Table to be placed in the church with the slate slabs decorated with marble mosaics suspended on the front and sides of the table in the manner proposed in the supplementary petition. RECTOR AND CHURCHWARDENS OF ST. LUKE'S, CHELSEA *v.* WHEELER - **Consist. Ct. of London. 257**

3. —— *Jurisdiction—Irrevocability of Faculty except for Fraud—Disused Burial Grounds Act*, 1884 (47 & 48 *Vict. c.* 72), *s.* 3—*Faculty authorizing Erection of Building in Contravention of*

ECCLESIASTICAL LAW—*continued.*

Act of Parliament—Meaning of Exemption permitting Building to be erected "for the Purpose of enlarging a Church, Chapel, Meeting-house or other Places of Worship"—Variation of Faculty by Consent of Petitioners—Practice—Costs.

A faculty granted by the Ordinary after citation and unappealed against cannot, in the absence of the consent of all the parties interested, be revoked for any cause other than fraud.

The 3rd section of the Disused Burial Grounds Act, 1884, provides that after the passing of that Act it shall not be lawful to erect any buildings upon any disused burial ground (defined by that Act to mean a burial ground in respect of which an Order in Council has been made for the discontinuance of burials therein in pursuance of the Burial Acts, 1852 and 1853), except for the purpose of enlarging a church, chapel, meeting-house or other places of worship.

In June, 1901, on the application of the vicar and churchwardens of a parish church in the diocese of London within the metropolis, the Ordinary sanctioned by faculty the erection on a portion of the churchyard of the parish—a disused burial ground within the above Act of 1884—in substitution for the erection on the same churchyard of a parish room over two vestries at the south end of the church sanctioned by a previous faculty (granted in September, 1900), a larger hall capable of seating 240 persons, abutting on the church on its north side immediately behind the chancel and communicating with the church by means of a door or doors, together with two vestries on the east side of the church, and lavatories and a kitchen on the sides of the hall, the hall to be used when required as a vestry and for Sunday schools and mission services and other parochial purposes.

Citations to lead these faculties had been duly served, but no appearance had been entered thereto, and the decrees in pursuance of which they had been granted were not appealed against. In March, 1902, the London County Council, the statutory authority to enforce the Disused Burial Grounds Act within the metropolis, instituted a suit in the Consistory Court of London, and in their petition prayed that the faculty of June 27, 1901, should be revoked or amended in such manner that no authority should be given therein to contravene the above 3rd section of the Act of 1884. The vicar and churchwardens appeared to defend the suit, and pleaded that the Court had no jurisdiction to rescind the faculty; but the sole question relied on and argued at the hearing was whether the faculty sought to be revoked contravened the Act of 1884. The petitioners did not ask for the revocation of the faculty on the ground of fraud, and gave no evidence either of fraud or of the Court having been deceived by the respondents or third parties. The Consistory Court of London refused to revoke the faculty as prayed, holding that the faculty had been properly granted, as the buildings the erection of which had been sanctioned by it were buildings erected for the purpose of enlarging the church within the exception contained in the 3rd section of the above Act.

The London County Council appealed:—

Held, on appeal, that the refusal of the Court below to revoke the faculty was right, as where in a faculty suit a citation has been duly served no Ecclesiastical Court has jurisdiction in the absence of consent to revoke a faculty obtained in the suit without fraud and unappealed against.

Semble, that the faculty sought to be revoked authorized an infringement of the Disused Burial Grounds Act, 1884, in so far as it sanctioned the erection of the parish hall and the lavatories and kitchen connected with it, and was to that extent a nullity; that the 3rd section of that Act did not extend to render lawful the erecting of buildings which, though under the same roof as the church and in physical communication with it, were intended to be used for ecclesiastical purposes for which the church would not be used in ordinary course, and that so far as the 3rd section of the Act related to churches it only permitted buildings to be erected which were in physical communication with the church and enlarged it for the main and primary purpose of religious worship.

The appeal was dismissed without costs, as the point on which the respondents succeeded as to the irrevocability of the faculty, though raised on the pleadings, had not been relied on or argued in the Court below. LONDON COUNTY COUNCIL *v.* DUNDAS

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EVIDENCE—*Date of Birth—Register—Entry—Births and Deaths Registration Act*, 1836 (6 & 7 *Will.* 4, c. 86).

A certified copy of an entry in a register of births and made pursuant to the statute 6 & 7 Will. 4, c. 86, is evidence, not merely of the fact of birth before the date of registration, but of the actual date of birth.

In re Wintle, (1870) L. R. 9 Eq. 373, disapproved. IN THE ESTATE OF GOODRICH. PAYNE *v.* BENNETT - - - Jeune Pres. **138**

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NOTARY — *Appointment of Notaries Public* — 25 *Hen.* 8, *c.* 21—*Discretion of Master of Faculties as to Appointments in Colonies — Number of Notaries Public practising at Melbourne—Practice —Costs.*

The jurisdiction of the Court of Faculties to appoint notaries public in the Colonies is derived from the statute of the 25 Hen. 8, c. 21, and neither that nor any other statutory enactment prescribes any qualifications to be possessed by applicants, who in all cases are appointed in the discretion of the Master of the Faculties.

Where, therefore, a chartered accountant, holding the appointments of official assignee of insolvent estates in the State of Victoria and commissioner for taking affidavits in the Supreme Courts of several States of the Australian Commonwealth, applied to be appointed a notary public for the State of Victoria, and supported his application by an influential memorial and the usual certificate of personal fitness, the Master of the Faculties, though the more recent practice had been to appoint solicitors, thought fit in the special circumstances of the case to grant the applicant a faculty for his appointment as prayed.

By this appointment the number of notaries practising at Melbourne and in the State of Victoria was raised to thirty-seven.

Circumstances which guide the Master of the Faculties in fixing the number of notaries public to be appointed in any particular place where the appointments are made in his discretion. BAILLEAU *v.* VICTORIAN SOCIETY OF NOTARIES. (MELBOURNE NOTARIES) - **Ct. of Faculties 180**

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—— Costs—Notaries — Discretion of Master of Faculties as to appointments in Colonies *See* NOTARY - - - **180**

—— Costs — Suit for revocation of probate—Notice by plaintiff to cross-examine **141** *See* PROBATE. 3.

—— Counter-claim in personam—Action in rem —Foreign plaintiffs—Demurrage **339** *See* SHIPPING. 16.

—— Hearing, Right of—Person in contempt—Married woman - - - **163** *See* DIVORCE. 2.

PROBATE—*Colonial Probates Act*, 1892 (55 & 56 *Vict. c.* 6)—*Limited Grant—Resealing.*

A Colonial grant, though limited, may be resealed in the United Kingdom, provided that the proper conditions prescribed by the Colonial Probates Act, 1892, have been complied with. IN THE GOODS OF SMITH - **Bucknill J. 114**

2. —— *Domicil—Practice—Foreign Domicil, Will, and Marriage—English Domicil subsequently acquired—Wills Act*, 1861 (24 & 25 *Vict. c.* 114), *s.* 3—*Construction.*

The 3rd section of the Wills Act, 1861, the title of which is, "An Act to amend the law with respect to wills of personal estate made by British subjects":—

Held (by Gorell Barnes J.), not to be limited in its operation to the wills of British subjects, but to extend to the will of a foreign testatrix, made before her marriage, and in strict conformity with the law of her foreign domicil at that time; according to which, marriage does not revoke a will:

Held, further, that the English domicil acquired by the testatrix after the date of the will and after the date of the marriage did not affect the question of the validity of the will, but that, as the will in terms provided (in accordance with the law of the former domicil), that the executorship should be limited to the space of one year, the grant of probate must be limited to one year from the date of the death of the testatrix. IN THE ESTATE OF GROOS - **Gorell Barnes J. 269**

3. —— *Practice—Costs—Rule* 41 (*Contentious Rules*, 1862)—*Rules of the Supreme Court, Order XXI., r.* 18—*Suit for Revocation of Probate—Notice by Plaintiff to cross-examine.*

In construing Order XXI., r. 18, the principles which guided the old Ecclesiastical Courts, and afterwards the Probate Court, ought to be considered; and, following out those principles, a distinction is to be drawn between a party who seeks to call in and obtain revocation of probate, and a party who enters a caveat and takes the ordinary steps in opposing a will being admitted to proof.

A notice given under Order XXI., r. 18, by a plaintiff who claimed revocation of probate, *held* bad.

Beale v. *Beale*, (1874) L. R. 3 P. & M. 179, approved. TOMALIN *v.* SMART **Jeune Pres. 141**

4. —— *Practice—Universal Devisee and Legatee—No Executor named—Administration or Probate—Title of Administrator to Real Estate—*

PROBATE—*continued.*

Land Transfer Act, 1897 (60 & 61 *Vict. c.* 65), *s.* 1, *sub-s.* 1; *s.* 24, *sub-s.* 2.

The universal devisee and legatee of a testamentary paper in which no executor is named, is entitled to administration with the will annexed, but not to probate according to the tenor of the will. The practice of the Probate Court hitherto prevailing in this respect has not been altered by the Land Transfer Act, 1897.

Per Stirling L.J.: The title of an administrator, though it does not exist until the grant of administration, relates back to the time of the death both as to real estate (by virtue of s. 1, sub-s. 1) as well as to personalty. IN THE GOODS OF PRYSE - - - - **C. A. 301**

PROHIBITION—"Collision"—Damage by ship to pier—County Courts Admiralty Jurisdiction - - - - **187** *See* SHIPPING. 7.

PUBLIC POLICY—Salvage—Negligence of tug that of her master—Services rendered by tug to tow—Claim of crew of tug **60** *See* SHIPPING. 18.

REGISTRATION—Birth, Date of—Register—Entry - - - - **138** *See* EVIDENCE.

RES JUDICATA — Estoppel — Judgment by default in foreign country - - **41** *See* SHIPPING. 11.

RESEALING—Colonial probate—Limited grant *See* PROBATE. 1. **114**

RESTRAINT ON ANTICIPATION — Married woman — Separate estate — Power to order payment of costs—"Proceeding instituted" - - - - **163** *See* DIVORCE. 2.

REVOCATION—Costs—Suit for revocation of probate—Notice by plaintiff to cross-examine - - - - **141** *See* PROBATE. 3.

RULES OF SUPREME COURT:—Order XXI., r. 18—*Defence and Counter-claim* **141** *See* PROBATE. 3.

SALVAGE — Appeal — Practice — Reduction of award—Costs - - - **83** *See* SHIPPING. 17.

—— Collision—Third vessel—Right of tug to towage remuneration though debarred from salvage - - - **403** *See* SHIPPING. 6.

—— Jurisdiction — Action in rem — Foreign plaintiffs—Counter-claim in personam —Demurrage - - - **339** *See* SHIPPING. 16.

—— Launchers of lifeboats - - **310** *See* SHIPPING. 19.

—— Signals of distress properly made—Services not required - - - **76** *See* SHIPPING. 20.

SALVAGE—*continued.*

—— Towage contract between owners of salving and salved vessels—Independent rights of master and crew of salving vessel
See SHIPPING. 21. 345

—— Tug and tow to blame for collision with third vessel—Negligence of tug that of her master - - - - 60
See SHIPPING. 18.

—— Value of salved vessel for purposes of award - - - - 131
See SHIPPING. 22.

SEALING — Resealing — Colonial probate — Limited grant - - - 114
See PROBATE. 1.

SEQUESTRATION—Interest, Insufficiency of—Sequestrator during vacancy of benefice
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SET-OFF—Costs—Divorce—Finding of desertion—Immateriality—Refusal of decree of judicial separation - - - 382
See DIVORCE. 1.

SETTLEMENT—Variation of—Answer to petition before decree absolute — Lis pendens - - - - 306
See DIVORCE. 5.

—— Variation of — Child — Question of legitimacy—Issue directed - - 274
See DIVORCE. 6.

—— Variation of — Hearing of issue as to legitimacy of child - - 378
See DIVORCE. 7.

SHIPPING—*Bill of Lading—Discharge of Cargo —"As fast as Steamer can deliver or the Goods will be landed"—Deficiency of Wagons—Liability of Consignee for Delay—Option of Shipowner as to Remedy.*

In an action by shipowner against receivers of cargo for damages for detention of his vessel, a county court judge gave judgment in favour of the receivers of the cargo on the ground that the stipulation in the bill of lading that the goods were "to be taken from the ship by the consignees at their expense immediately after arrival, and as fast as steamer can deliver or the same will be transhipped into lighters, or landed, or warehoused at the expense and risk of the proprietors of such goods," divested the shipowner of any other remedy than that of landing or lightering the goods:—

Held, by the Divisional Court (Jeune P. and Gorell Barnes J.), reversing the decision of the Court below, that the shipowner had an option, so that he was not deprived of his ordinary remedy by not exercising the power of landing or lightering the goods; and, further, that the shipowner was entitled to judgment, as the receivers of the cargo had failed to shew that they had done their best in the actual circumstances to make the appliances of the port available. THE ARNE - - Div. Ct. 154

2. —— *Bill of Lading—Exceptions—Damage to Cargo — Marginal Clause — "Sweating" — "Heat" — "Decay" — Negligence of Carrier's Servants—Liability of Carrier.*

In an action by indorsees of bills of lading, for damage, through negligent stowage, to a cargo of grain, part of which had become heated during the voyage, and the remainder otherwise deteriorated, the defendant shipowners relied on a series of exceptions, set out in numbered paragraphs, by which they were not to be responsible for (paragraph 2) "loss, damage, or injury arising from sweating . . . . decay . . . . explosion, heat, fire at sea or on shore . . . ."; nor for (paragraph 3) "any loss or injury to the said goods, occurring from any of the causes above mentioned or for any loss or injury arising from the perils or accidents of the seas . . . . whether any of the perils, causes, or things above mentioned or the loss or injury arising therefrom be occasioned by or from any act or omission, negligence, default, or error in judgment of . . . . stevedores . . . . or other persons in the service of the shipowners." They further relied on a marginal note, stamped on the bill of lading, under which a large quantity of maize was carried, stating that "In no case is the s.s. to be held liable for heating or any other damage accruing to the within-mentioned goods . . . .":—

Held, by Gorell Barnes J., that the defendants were liable, for, following *Price* v. *Union Lighterage Co.*, [1904] 1 K. B. 412, a shipowner must indicate by express words his intention to relieve himself from liability for the negligence of his servants, and the exemption of negligence in the third paragraph could not be incorporated so as to refer to the matters excepted in the second paragraph or in the marginal note; and, further, that the words "sweating" and "decay" were inapplicable to cover the damage to the maize through improper stowage, whilst the collocation of the words shewed that "heat" referred to heat arising from some extraneous cause, such as heat from the engine-room. THE PEARLMOOR - - Gorell Barnes J. 286

3. —— *Coaling Contract—Bill of Exchange—Liability of Master as Drawer — Qualifying Words—Notice of Dishonour—Special Circumstances excusing Delay—Bills of Exchange Act*, 1882 (45 & 46 *Vict. c.* 61), *ss.* 48, 49, *sub-s.* 12; *s.* 50, *sub-s.* 1.

In pursuance of a contract for the supply of bunker coal, made between the owners of a steamship, as buyers, and the agents of the suppliers of the coal at Colombo, as sellers, the defendant, the master of the steamship, drew a bill of exchange on the owners of the vessel in favour of the suppliers, concluding with the words "value received on 300 tons coal and disbursements . . . . supplied to my vessel to enable her to complete this voyage from Melbourne to Hull, for which I hold my vessel, owners, and freight responsible." The bill was duly accepted in London, but on presentation for payment at maturity on a Saturday was dishonoured. The plaintiffs, holders of the bill, learnt through their bankers on the Monday that the bill was not paid, and having communicated with the agents of the suppliers of the coal, ascertained that the vessel had arrived in the Tyne; but not knowing in what part, they made further inquiries without success, and on the following Thursday sent the defendant notice of

SHIPPING—*continued.*

dishonour by registered letter, addressing him as master of the vessel at Newcastle-on-Tyne :—

Held, by Gorell Barnes J., that the defendant was liable as drawer in accordance with the decision in *The Ripon City*, [1897] P. 226, for the wording of the bill did not by implication relieve him of that liability; and, secondly, that he was not discharged by reason of the delay in giving notice of dishonour, as the special circumstances excused that delay within the meaning of s. 49, sub-s. 12, and s. 50, sub-s. 1, of the Bills of Exchange Act, 1882. THE ELMVILLE

Gorell Barnes J. 319

4. —— *Collision—Compulsory Pilotage—Port of Liverpool—Limit of Compulsion outwards—Mersey Dock Acts Consolidation Act*, 1858 (21 & 22 *Vict. c. xcii.*), *ss.* 127, 133—*Failure to stand by—"Person in Charge"—"Proof to the contrary"—Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *s.* 422.

The pilot of the defendants' vessel outward bound from Liverpool was found alone to blame for a collision with the plaintiffs' vessel at anchor one mile S. ½ E. of the Mersey Bar Lightship, and the "person in charge" of the defendants' vessel was also found to have committed a breach of s. 422 of the Merchant Shipping Act, 1894, by failing to stand by the plaintiffs' vessel :—

Held, by Gorell Barnes J., that the defendants were not liable for the damage sustained by the plaintiffs, first, because the pilot was compulsorily in charge, the place where the collision occurred being inside the Bar Lightship, which, though farther out to the westward, represents the Fairway Buoy of the Queen's Channel, now removed, but, at the time of the passing of the Mersey Dock Acts Consolidation Act, 1858, marking the spot, inside the place of collision, where a vessel passing out through the channel would be clear of danger, and, therefore, at that time, made the westernmost limit, for pilotage purposes, of the port of Liverpool; secondly, because, on the authority of *The Queen*, (1869) L. R. 2 A. & E. 354, the pilot being alone to blame for the collision and being compulsorily in charge, "proof to the contrary" had been given rebutting the presumption that the collision had been caused by the wrongful neglect of the master. THE SUSSEX

Gorell Barnes J. 236

5. —— *Collision—Damage—Freight—Abandonment of Voyage—Claim by Cargo Owner—"Substituted Expense."*

A collier from the Tyne to Cape Town, under charter to the Admiralty, came into collision with a steamship in the English Channel and put back to the Thames for repairs. The cargo of coals had to be discharged, and, by arrangement between the Admiralty, as the owners of the cargo, and the owners of the collier, the voyage was treated as abandoned, the cargo sold, and a sum of 1000*l.* agreed to be paid by the Admiralty to the owners of the collier as a "substituted expense" in lieu of the larger sum which, it was estimated, would have been incurred for storage and reshipment if the collier had carried on the coals at the end of the six weeks required for repairs.

SHIPPING—*continued.*

At the usual ships' reference, after a decree of both to blame, a moiety of the claim by the owners of the collier for repairs and detention was paid by the owners of the steamship; but at a reference between the Admiralty and the owners of the steamship a claim, made by the Admiralty against the owners of the steamship for their adjusted proportion of the 1000*l.* was disallowed by the registrar. On objection to the report :—

Held, by Bucknill J., affirming the report of the registrar, that the amount claimed by way of "substituted expense" was not such a consequence of the collision as to render the owners of the steamship liable for their proportion as wrong-doers. THE MINNETONKA **Bucknill J. 202**

6. —— *Collision—Damage—Tug and Tow—Third Vessel—Pilot Cutter lashed to Tow—Independent Duty of Tug to avoid Danger—Identification—Right of Tug to Towage Remuneration though debarred from Salvage.*

Two tugs were towing a sailing vessel, in charge of a pilot, down the Bristol Channel, with a pilot cutter made fast to the sailing vessel, when, owing to the negligence of the tow and her tugs, the pilot cutter was sunk by collision with a schooner, which was also damaged. In an action by the owners of the pilot cutter against the owners of the schooner and the owners of the tugs, in which the owners of the schooner counter-claimed against the owners of the pilot cutter and the owners of the tugs :—

Held, by the President (Sir F. H. Jeune), following *The Altair*, [1897] P. 105, that the pilot cutter and the schooner were entitled to succeed against the tugs, for, though those in charge of the tow were negligent in not properly directing the tugs, an independent duty was cast upon the tugs to exercise reasonable care and skill in keeping clear of the schooner; and, further, following *The Bernina*, (1888) 13 App. Cas. 1, that the pilot cutter was not identified with the sailing vessel so as to be unable to recover.

After the collision one of the tugs towed the schooner to Cardiff, and claimed salvage remuneration :—

Held, that, though the tug was bound to stand by, and was barred by her negligence from recovering salvage, she was not bound to tow the schooner to her port of destination, and was, therefore, entitled to payment on ordinary towage terms. THE HARVEST HOME - **Jeune Pres. 409**

7. —— "*Collision*"—*Damage by Ship to Pier—County Courts Admiralty Jurisdiction Act*, 1868 (31 & 32 *Vict. c.* 71), *s.* 3, *sub-s.* 3—*County Courts Admiralty Jurisdiction Amendment Act*, 1869 (32 & 33 *Vict. c.* 51), *s.* 4—*Prohibition.*

Damage done by a ship to a pier is not "damage by collision" within s. 3, sub-s. 3, of the County Courts Admiralty Jurisdiction Act, 1868, and, therefore, a county court has no Admiralty jurisdiction in respect of such damage. THE NORMANDY - - - **Div. Ct. 187**

8. —— *Collision—Fog Signals—Steam Trawler—Regulations of* 1884 *relating to Fishing Vessels, art.* 10 (*g*)—*Regulations for Preventing Collisions at Sea*, 1897, *art.* 15 (*a*).

The general provisions of art. 15 (*a*) of the

SHIPPING—*continued.*

Regulations for Preventing Collisions at Sea, 1897, do not override the special provisions of art. 10 (*g*) of the Regulations of 1884, which are still in force, and, therefore, a British steam trawler, when trawling in the sea off the coast of Europe north of Cape Finisterre, must, in fog, not make whistle signals, but "at intervals of not more than two minutes make a blast with her fog-horn and ring her bell alternately."

Observations on the necessity, with reference to fishing vessels, for the promulgation of regulations, relating to signals and lights, of an international character, and not limited in area. THE LONDON - - - - **Jeune Pres. 355**

9. —— *Collision—Manchester Ship Canal—Fog—Regulations for Preventing Collisions at Sea*, 1897, *arts.* 16, 30—*Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *s.* 418.

Semble: The Regulations for Preventing Collisions at Sea do not apply to the Manchester Ship Canal; but, assuming that they do, the second paragraph of art. 16 of those regulations—by which "a steam vessel hearing, apparently forward of her beam, the fog signal of a vessel the position of which is not ascertained, shall, so far as the circumstances of the case admit, stop her engines . . . ."—will not be compulsory, for the approaching vessel, of which the fog signal is heard, must be in the canal, and presumably on her right side, so that her position is, in the circumstances, sufficiently ascertained by those in charge of the vessel hearing the whistle, to absolve them from the obligation to "stop her engines," and they can, therefore, continue to navigate their vessel with caution on her own right side, so as to pass the other vessel. THE HARE - - - **Gorell Barnes J. 331**

10. —— *Collision—"Not under Command"—Damage—Regulations for Preventing Collisions at Sea*, 1897, *art.* 4 (*a*), (*c*).

Two sailing vessels were approaching one another so as to involve risk of collision, the one close-hauled on the starboard tack, shewing her green light to the other, the other running free shewing her red light; but also exhibiting two red lights as signals that from an accident she was "not under command," and, therefore, could not get out of the way. The close-hauled vessel being unable to luff owing to the presence of the green and masthead lights of a steam vessel on her starboard bow, put her helm up, and would have crossed the bows of the vessel running free, had not that vessel defeated the manœuvre by porting. In an action of damage by collision:—

Held, by Gorell Barnes J., that the vessel running free was alone to blame, as she had indicated by her two red lights and side-lights that she was not under command, and was making way through the water. She should, therefore, have kept her course so as to enable the close-hauled vessel—otherwise entitled to keep her course—to get out of the way.

Whether a vessel is, in the circumstances, "not under command," so as to justify her, under art. 4 of the Regulations for Preventing Collisions at Sea, in exhibiting the appropriate signal, is a nautical question for the assessors. THE HAWTHORNBANK - - **Gorell Barnes J. 120**

SHIPPING—*continued.*

11. ——*Collision—Tug and Tow—Fog—Regulations for Preventing Collisions at Sea*, 1897, *art.* 16—*Obligation on Tug to stop—Control of Tug by Tow—Judgment by Default in Foreign Country—Estoppel—Res Judicata.*

A steamship proceeding in a dense fog up the English Channel at a moderate speed on a course of E. ½ N. stopped her engines, in accordance with the second paragraph of art. 16 of the Regulations for Preventing Collisions at Sea, on hearing a fog signal apparently forward of her beam, and on hearing a second signal reversed; but she came into collision with a sailing vessel in tow of a tug proceeding on a crossing course of W.S.W. at a moderate speed of from two to three knots. The whistle of the steamship had been heard fine on the starboard bow of the sailing vessel; but the engines of the tug were not stopped in accordance with the above regulation, on the ground that as the tug was proceeding at the minimum speed compatible with keeping the tow under control, it was not the duty of the tug to stop:—

Held, by Gorell Barnes J., that the steamship was not to blame as she had complied with the rule by stopping, and was not bound to reverse before she did so; but that both tug and tow were to blame, as it was practicable for the tug to have stopped her engines and let the way run off the tow.

The Merthyr, (1898) 8 Asp. M. L. C. 475, and *The Lord Bangor*, [1896] P. 28, distinguished.

After the collision the steamship, which was a British vessel, proceeded to her port of destination in Belgium, where her owners gave bail to prevent her arrest pending proceedings in a French Court by the French owners of the sailing vessel. These proceedings resulted in a judgment by default for the damage sustained by the sailing vessel against the owners of the steamship, and, under a treaty existing between France and Belgium, the French owners of the sailing ship took steps to enforce the judgment in Belgium, and the owners of the steamship appeared in the Belgian Court to resist execution. The owners of the sailing ship pleaded the foreign judgment in bar of the present action in this country:—

Held, by Gorell Barnes J., that the plea of res judicata failed, as the judgment by default of appearance did not work an estoppel in respect of the action of damage by collision brought by the owners of the British steamship against the owners of the French sailing vessel and the owners of her British tug, for the owners of the steamship, by appearing in the Belgian Court, had not submitted themselves to the jurisdiction of the French Court, and no judgment on the merits in the presence of the parties had been pronounced by a foreign Court.

The Delta, (1876) 1 P. D. 393, followed. THE CHALLENGE AND DUC D'AUMALE **Gorell Barnes J. 41**

12. —— *Collision—Vessel coming out of Dock into River—Regulations for Preventing Collisions at Sea*, 1897, *art.* 19—*Powers of Dock Master—Mersey Dock Acts Consolidated Act*, 1858 (21 & 22 *Vict. c. xcii.*), *s.* 49.

A steam vessel, ready to proceed to sea, was

SHIPPING—*continued.*

stopped by the dock officials in the entrance to the Prince's Dock, Liverpool, and then told by the dock-master she might go, but warned to look out for a tow and her tugs coming down the river. The steam vessel came into collision with the tow and one of her tugs. In an action by the owners of the tow against the owners of the steam vessel for the damage sustained, and by the owners of the steam vessel against the dock board for negligence in ordering the vessel to proceed out into the river when the dock officials knew or ought to have known that it was not safe for her to do so:—

Held, by Bucknill J., that, as against the tow, the steam vessel was alone to blame, for, by the exercise of reasonable care, the lights of the down-coming tow and of her tugs might have been seen in due time, and the collision avoided, the tow and her tugs not being bound by art. 19 of the Regulations for Preventing Collisions at Sea to keep out of the way of the steam vessel coming out of dock on their starboard side.

Secondly, that the action against the dock board failed, for, though under s. 49 of the Mersey Dock Act, 1858, a dock-master may order a ship to leave the premises of the dock board, he had not exercised that power. THE SUNLIGHT **Bucknill J. 100**

13. —— *Limitation of Liability — Foreign Steam Vessel—Gross Tonnage—Order in Council, May 5, 1873, relating to French Vessels—Double Bottom for Water Ballast—Foreign Certificate—Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *ss.* 81, 84, 503, 724, 745.

In an action of limitation of liability by the owners of a French steam vessel constructed with a double bottom for water ballast, a duly authenticated copy of the Order in Council of May 5, 1873, was produced shewing that French vessels are to be deemed to be of the tonnage denoted in their certificates of registry, and the French certificate of registry was annexed to the usual affidavit verifying the statement of claim. This certificate gave the gross tonnage exclusive of the double bottom, and a certificate of a French surveyor stated that the space between the inner and the outer plating of the double bottom was not available for the carriage of cargo, stores, or fuel:—

Held, by Gorell Barnes J., that this was a sufficient compliance with the provisions of ss. 81, 84, and 503 of the Merchant Shipping Act, 1894, and enabled the gross tonnage of the vessel to be calculated upon which the plaintiffs' statutory liability in damages was based.

The Zanzibar, [1892] P. 233, followed, and applied to a French vessel. THE CORDILLERAS **Gorell Barnes J. 90**

14. —— *Master's "Wages" —Extra Wages—Emoluments—Disbursements — Liabilities—Maritime Lien—Costs of defending Action on Bill of Exchange—Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *ss.* 167, 742.

The costs incurred by a master in unsuccessfully defending an action on a dishonoured bill of exchange drawn by him on his owners for the price of coals supplied to the ship will not be deemed "liabilities properly incurred by him (as

SHIPPING—*continued.*

master) on account of the ship" within the meaning of s. 167 of the Merchant Shipping Act, 1894, unless the defence was reasonably necessary in the interests of the ship.

The term "wages" in s. 167 will include a bonus of 50*l.* promised to a master by his owners during a voyage, in addition to his agreed wages, on condition that he remained with the vessel, and satisfied his owners that he had done all in his power to promote the interests of the ship. THE ELMVILLE (No. 2) - - **Jeune Pres. 422**

15. —— *Pilotage, Compulsory—Vessel passing through Port of Liverpool—Limits of Port—Port of Manchester—8 Anne, c. viii., s. 3—Mersey Dock Acts Consolidation Act*, 1858 (21 & 22 *Vict. c. xcii.*), *s.* 128—*Manchester Ship Canal Act*, 1885 (48 & 49 *Vict. c. clxxxviii.*), *ss.* 3, 211—*Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *s.* 605—*Mersey Docks (Pilotage, &c.) Act*, 1899 (62 & 63 *Vict. c. clxxii.*), *ss.* 3, 4, 5—*Costs.*

The defendants' vessel, inward bound from the sea to Manchester, after anchoring in the Mersey to wait for the tide, was proceeding through the Eastham Channel when she came into collision, near No. 4 buoy, with the plaintiffs' vessel. In an action of damage by collision, the pilot of the defendants' vessel was found alone to blame:—

Held, by Gorell Barnes J., that pilotage was compulsory, and, therefore, the defendants were not liable, for, under the Mersey Dock Acts Consolidation Act, 1858, the master of every vessel other than a coaster in ballast, or under the burthen of one hundred tons, entering the port of Liverpool from the sea, is under an obligation to employ a pilot, and, if the vessel is proceeding to the port of Manchester, viâ the Ship Canal, the duties of the pilot continue until the vessel reaches Eastham.

Semble, every vessel, with the same exceptions, outward bound from the Manchester Ship Canal, is under compulsory pilotage on leaving the canal at Eastham. THE MERCEDES DE LARRINAGA - - **Gorell Barnes J. 215**

16. —— *Practice —Jurisdiction — Salvage — Action in Rem —Foreign Plaintiffs — Counterclaim in Personam—Demurrage.*

The owners, master, and crew of a steamtug, all foreigners out of the jurisdiction, commenced an action in rem in the Admiralty Division against the defendants, owners of a British ship and her freight, for salvage services alleged to have been rendered to the defendants' vessel in Northern Russia. The defendants, besides defending the action, set up a counter-claim in personam for demurrage alleged to be due by the owners of the steam-tug under two charter-parties. On an application by the plaintiffs to strike out the counter-claim:—

Held, by the Court of Appeal (Collins M.R. and Stirling L.J.), that a judge of the Admiralty Division, as a judge of the High Court, has jurisdiction to try such a counter-claim, and that the discretion of the judge, in refusing to strike out the counter-claim on the ground of embarrassment, had been rightly exercised.

Griendtoveen v. *Hamlyn & Co.*, (1892) 8 Times L. R. 231, followed. THE CHEAPSIDE **C. A. 339**

17. —— *Salvage—Appeal—Practice—Reduction of Award—Costs.*

Where the amount of a salvage award is reduced, the general rule, laid down in *The Gipsy Queen*, [1895] P. 176, is not to give costs, but an appellant succeeding in considerably reducing the award will be allowed the costs of the appeal.

The Kilmaho, (1900) 16 Times L. R. 155, followed. THE PRINCE LLEWELLYN - **Div. Ct. 83**

18. —— *Salvage—Contract of Towage—Tug and Tow to blame for Collision with Third Vessel—Negligence of Tug that of her Master—Services rendered by Tug to Tow—Claim of Crew of Tug—Public Policy.*

A sailing vessel, whilst in tow of a steam-tug, under a contract of towage, came into collision with a third vessel, and the tug and tow were found to blame, the negligence of the tug being that of her master. After the collision the tug towed the sailing vessel in her damaged condition to the nearest port of safety, and the owners, master, and crew of the tug claimed salvage:—

Held, by Gorell Barnes J., that the tow having been placed in a difficulty by the joint negligence of tug and tow, the tug could not claim salvage for services afterwards rendered in extricating the tow from that difficulty, for the claim of the owners of the tug was barred by reason of the negligence of their agent, the master, having in part caused the mischief from the consequences of which the tow was rescued; the claim of the master was barred by reason of his being the party actually guilty of the negligence in part causing the mischief, and the claim of the crew was also barred in Admiralty on the ground of public policy, which rendered it undesirable to encourage a crew to hope to recover salvage in respect of services to be rendered to a vessel damaged through the contributory negligence of their master.

The Cargo ex Capella, (1867) L. R. 1 A. & E. 356, followed. THE DUC D'AUMALE (NO. 2) **Gorell Barnes J. 60**

19. —— *Salvage—Launchers of Lifeboats.*

When a lifeboat, belonging to the National Lifeboat Institution, is launched for the purpose of saving life, the crew of the lifeboat, and the launchers, look to the institution for payment according to the scale provided by the rules; but if, on arriving at the vessel in danger, the services of the crew of the lifeboat are engaged to endeavour to save the vessel, then, as the crew of the lifeboat becomes, under the rules, a party of salvors who have borrowed the lifeboat for property salvage purposes, and who look to the owners of the property for their remuneration, the launchers will also be entitled to look to the owners of the property for salvage in respect of the services which their efforts enabled the crew of the lifeboat to render. THE CAYO BONITO - - **Gorell Barnes J. 310**

20. —— *Salvage—Signals of Distress properly made—Services not required—Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *s.* 434, *sub-s.* 2.

By the Merchant Shipping Act, 1894, s. 434, sub-s. 2, the improper use or display of the signals of distress, authorized by the Act, renders the master of a vessel liable to pay compensation for any labour undertaken, risk incurred, or loss sustained, in consequence of the signal being supposed to be a signal of distress; but the sub-section does not, by implication, give any right to compensation in favour of those who, in response to signals of distress properly used or displayed, offer services which are not required. THE ELSWICK PARK **Bucknill J. 76**

21. —— *Salvage—Towage Contract between Owners of Salving and Salved Vessels—Independent Rights of Master and Crew of Salving Vessel.*

Owners in Liverpool were informed by telegraph that their vessel was lying disabled off the south coast of Ireland, and agreed with the owners of a tug, known to be in the neighbourhood of the disabled vessel, that their vessel should be towed to Liverpool on the usual towage terms per tide; but, before the owners of the tug could instruct their tug master, and before the agreement was made, the tug master had proceeded to the disabled vessel, and had commenced towing her to Liverpool. In an action of salvage brought by the owners, master, and crew of the tug against the owners of the disabled vessel, her cargo and freight:—

Held, by the President (Sir F. H. Jeune), that the owners of the tug were bound by the towage agreement; but, following *The Inchmaree*, [1899] P. 111, that her master and crew had acquired independent rights which must be dealt with on salvage terms. THE FRIESLAND **Jeune Pres. 345**

22. —— *Salvage—Value of Salved Vessel for purposes of Award.*

A steam trawler, having fallen in with a disabled steam vessel in the North Sea, towed her to a position off Aberdeen; but as, in the heavy weather prevailing, the master of the trawler was unwilling to incur the risk, without a pilot, of taking a large disabled vessel into the harbour, signals were made for a pilot and a tug, in response to which a tug came out and offered to pilot and tow the disabled vessel in. The master of the disabled vessel declined to accept her services and, after some delay, the trawler was told to go ahead. The hawser parted, and the disabled vessel drove ashore, involving an expense of 1150*l.* to float her, and 5600*l.* for repairs. In an action of salvage brought by the owners, master, and crew of the trawler, it was contended by the owners of the disabled vessel that the award, if any, must be based, not on 8500*l.*, the value of the disabled vessel before she stranded, but on the amount she proved to be worth to them, namely, 1750*l.*:—

Held, by Gorell Barnes J., that the trawler had done all that could reasonably be expected of her, and was entitled to an award of 750*l.*, based on a valuation of 8500*l.*, that being the value of the disabled vessel at the time that she was brought within reach of the tug. THE GERMANIA - - **Gorell Barnes J. 131**

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